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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-47

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL,
Petitioners,

v.

CLARENCE BOREL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Fiberboard Corporation, Johns-Manville Products Corporation, Armstrong Cork Company, Philip Carey Corporation, Ruberoid Company, and Pittsburgh Corning Corporation, respectfully pray for a Writ of Certiorari issue to review the Judgment and Opinion of United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 10, 1973, and the Opinion on Motion for Rehearing entered on May 13, 1974.

OPINION BELOW

The original Opinion of the Court of Appeals is reported in 493 F.2d 1076, and the Opinion on Motion for Rehearing En Banc, not yet reported, appears in the Appendix hereto. No Opinion was rendered by the District Court for the Eastern District of Texas.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on September 10, 1973. A timely Motion for Rehearing En Banc was denied on May 13, 1974, with a written Opinion, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether Borel, an asbestos insulator, a resident of the State of Texas, and his employer must take judicial notice of the Workmen's Compensation Statute of Texas (1947), Article 8306, Section 20(n), Revised Civil Statutes of Texas, specifying "asbestosis" as an occupational disease, and Article 8306, Section 26(a) defining "asbestosis" as the characteristic condition of the lungs caused by the inhalation of asbestos, and whether such judicial notice, plus the undisputed knowledge of Borel that he was working with a product containing some asbestos and that the dust was causing him some harm, is sufficient as a matter of law to show notice and knowledge of Borel of the danger of "asbestosis" from exposure to asbestos dust from Petitioners' product.

2. Whether the failure to submit an interrogatory or a form of verdict whereby the jury could pass upon the defendants' defense of "assumption of risk" deprived the defendants of their right to a trial by jury as guaranteed by the *Constitution of the United States*.

3. Defendants contend that this case was submitted on special interrogatories and not on a combination of special interrogatories and a general verdict. Therefore, the opinion fails to follow rule 49(a) that no finding may be made by the court on an omitted fact issue. The opinion is there-

fore in conflict with the decision of other opinions of the Fifth Circuit and an opinion of the Fourth Circuit Court of Appeals.

4. Whether the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved, and thereby deprived defendants of a trial by jury on this issue. (App. p. 188 — Request No. 18).

5. The ex post facto application of strict liability in tort under Section 402A, Restatement of Torts, 2nd. Ed., (adopted in 1965), and adopted by Texas Courts in 1967, to occupational exposures to products containing asbestos by Borel commencing in 1937, is in conflict with opinions of the Supreme Court of Texas in *McKisson* v. *Sales Affiliates, Inc.* (1967) 416 S.W.2d 787, and *Houle* v. *Camp Amon Carter* (Tex. 1971) 470 S.W.2d 629, and *Pittsburg Coca-Cola Bottling Works* v. *Ponder*, 443 S.W.2d 546, 548 (Tex. 1969), and is in violation of the *Constitution of the State of Texas*, Article I, Section 16.

> "Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Vernon's Texas Constitution, Volume 1, Page 371.

STATUTORY PROVISIONS INVOLVED

Article 8306, Sec. 20, Revised Civil Statutes of Texas. "Injury" and "personal injury" defined; occupational diseases, what are:

> "Sec. 20. Whenever the term 'injury' or 'personal injury' are used in the Workmen's Compensation Law of this State, such terms shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result

therefrom. Unless from the content the meaning is clearly to the contrary, such terms shall also be construed to mean and include *occupational diseases*, as hereinafter defined. The following diseases only shall be deemed to be occupational diseases:

"(n) Asbestosis."

Article 8306, Sec. 26, Revised Civil Statutes of Texas. Silicosis and Asbestosis.

"Sec. 26(a) Whenever used in this section 'asbestosis' shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust." Acts 1947, 50th Leg., Page 176, Chap. 113, Para. 2, as amended Acts 54th Leg., Page 662, Chap. 233, Para. 1.

STATEMENT OF THE CASE

This is a products liability suit for damages instituted by Borel, an industrial insulator, in which his surviving wife was substituted as plaintiff, which went to trial against six manufacturers of insulation products containing some asbestos. Borel and his widow claimed that Borel developed the occupational disease of asbestosis during his 33 years as an insulator, beginning in 1936 and ending January 18, 1969. The Petitioners are manufacturers of the major portion of insulation products containing asbestos in the United States, and Borel claimed he was exposed to each defendants' product. Trial was to a jury, resulting in a verdict on "strict liability." The Fifth Circuit affirmed judgment for plaintiff, and overruled Petitioners' Motion for Rehearing.

Asbestos containing insulation was the only product available for high temperature insulation of piping and valves in ships, chemical plants, oil refineries, etc., in World War II up to 1971.

In 1947, the State of Texas amended the Workmen's Compensation Law, specifically naming the disease of

"asbestosis" as an occupational disease and defining asbestosis as the characteristic condition of the lungs caused by the inhalation of asbestos.

Each of the six remaining defendants have been held liable because of failure to give adequate notice of the danger of the occupational disease of asbestosis from exposure to their various products which contained some asbestos, such exposures being to various products over the period of 33 years up through 1969.

Borel had lung congestion for a period of five to ten years preceding his serious illness. A doctor advised him in 1964 upon X-ray examination that his lungs were cloudy and this was due to his occupation. (R. 1460). He had experienced shortness of breath from time to time, and in 1964 his doctor advised him to avoid breathing the asbestos dust. Borel knew he was working with asbestos products; he knew the dust was bad and had discussed the danger in such dust in union meetings (R. 1476-77); and he was aware of the dust problem from the time he began working as an insulator in 1936. Borel denied he was ever made aware of a specific risk of asbestosis or that he knew asbestosis was an occupational disease. Borel: "I knew I was working with insulation. Q. Did you know it contained asbestos, A Yes, sir, but I didn't know what asbestos was."

It takes a worker 20 to 25 years at a minimum to develop asbestosis, as it has a latency period of 20 years or longer. (R. 935).

There is no question but that the manufacturers knew of the disease of asbestosis from exposures in asbestos textile factories and factories where one hundred percent concentrations of asbestos wer processed, but the exposures of the industrial insulation worker presented an entirely different situation which was not comparable.

The first large scale survey of insulation workers was undertaken in the United States by Fleischer-Drinker, et al, in 1945.[1] The authors examined insulation workers in eastern Navy shipyards and concluded that "asbestos covering of naval vessels is a relatively safe operation." In 1947, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial exposures to dust from various products, recommended that the threshold limit value should be five million parts per cubic foot of air.[2] The Conference later determined in 1968 that the threshold limit value should be reduced to two million.

Research by Fleischer and Drinker in naval shipyards in 1946 (R. 1097), and Marr in naval shipyards in 1964 (R. 1099), revealed that dust exposure to insulation workers in naval ship construction was under the threshold limit value of five million and this was confirmed by the research of Balzer and Cooper (1965-1968), published in 1968 (R. 1095-1096-1097), researching working conditions of insulation workers on the Pacific Coast. Fleischer and Drinker, in 1946, and Marr, in 1964, published their con-

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[1] Fleischer, Viles, Gade and Drinker, A Health Survey of Pipe-Covering Operations in Constructing Naval Vessels, 28 J. Indust. Hyg. 9-16.

[2] See Documentation of the Threshold Limit Values for Substances in Workroom Air, A.C.G.I.H. (3ed 1971). The A.C.G.I.H. has described the threshold limit values as "conditions under which it is believed that nearly all workers may be repeatedly exposed, day after day, without adverse effect. The values listed refer to time-weighted average concentrations for a normal workday. The amount by which these figures may be exceeded for short periods without injury to health depends upon a number of factors such as the nature of the contaminant, whether very high concentrations even for short periods produce acute poisoning, whether the effects are cumulative, the frequency with which high concentrations occur, and the duration of such periods." See Threshold Limit Values for 1961, A.C.G.I.H. (1961).

clusion that it was reasonably safe for asbestos workers to work in naval shipyards.

In testifying before a House Committee, Dr. Irving J. Selikoff, of New York City's Mount Sinai Hospital, one of the leading medical researchers, stated in 1968 that the duty and responsibility is primarily that of the government and the scientists in cooperation to solve the problem. He made it clear that it was an unhappy reflection on the health authorities — government, public health authorities, the medical profession — that at this time, in the United States in the 1960's, 7% of all deaths among insulation workers are due to a completely preventable cause, pulmonary asbestosis. He goes on to say — and this was at a time when there was no thought of imposing liability on manufacturers of asbestos products and therefore without any reason for bias — that "it is evident that they had every right to look to their government and public health authorities and to the physicians and the scientists."

Such information as we now have," he goes on to say, "are measures to improve working conditions including the following: (1) *Improved working practices;* (2) Availability of *improved masks* or respirators; (3) Appropriate exhaust; (4) Appropriate health examinations and the vacuuming of clothes before going home; and (5) The substitution of less dusty materials when the job to be done permits it. In view of the variety of things that can be done to lessen the environmental hazards, it is inaccurate to blame any segment of the industry. No one really knows where the responsibility lies or what is economically or scientifically feasible. Does it belong with the materials maker? The individual employer? The regional employers' association? The National Employers' Association? The national materials manufacturers association? The local

unions? The international union? Only the Public Health Service can provide the long time surveillance necessary for the detection of effects with a *long latent period*." See Selikoff Statement Before House Committee, supra.[3]

It was not until Dr. Selikoff published his articles beginning in 1964 regarding the occurrence of asbestosis among insulation workers in the United States that scientists and researchers became aware that exposure to dust containing asbestos particles *which were within the recognized threshold limit* was probably producing injury to the insulation worker. Working conditions for insulation workers vary greatly. Tearing out old insulation in close quarters in ships and buildings produces greater exposure to asbestos dust. There is greater exposure in dust concentration in shops and there is less exposure when pipe insulation or block insulation is applied in open areas.

The Fifth Circuit in its original Opinion states: "This product liability case involves the scope of an asbestos manufacturer's duty to warn industrial insulation workers of the dangers associated with the use of asbestos." The jury found that the defendants breached a warranty by failing to warn Borel of the danger to which he was exposed in a product containing some asbestos. The Court further holds that the defendants' product was unreasonably dangerous because of the failure to give adequate warning of the known or knowable dangers involved. (Opinion, p. 17).

The Fifth Circuit further said: "In reaching our decision in the case at bar, we recognize that the question of the ap-

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[3] Hearings Before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, Ninetieth Congress, Second Session, on H. R. 14816, Occupational Safety and Health Act, March 7, 1968, Pages 349 through 369.

plicability of Section 402A of the *Restatement* to cases involving 'occupational diseases' is one of first impression. But though the application is novel, the underlying principle is ancient. Under the law of torts, a person has long been liable for the foreseeable harm caused by his own negligence." (Opinion, p. 54).

The plaintiff here did not recover upon the theory of negligence because of a finding of contributory negligence. (R. 1804). Plaintiff's recovery was based on "strict liability."

The Court further held that by 1964-66, Borel's illness was irreversible, but it nevertheless held Fibreboard, Armstrong Cork Co. and Pittsburgh Corning liable on the basis of exposures subsequent to such dates.

The trial court rendered judgment jointly and severally against the six manufacturers remaining on the theory of "strict Liability" under Sec. 402A, Restatement of Torts, and breach of an implied warranty of fitness because the products were unreasonably dangerous because they contained some asbestos, and *defendant failed to warn of the dangers of asbestosis.* The Court of Appeals affirmed on the same theory, holding that although as found by the jury, Borel knew he was working with asbestos containing products, that it was causing him harm, nevertheless, there was a duty to warn of the potential dangers of asbestosis.

On rehearing, the Court in an eleven page Opinion, overruled the Motion for Rehearing En Banc on May 13, 1974. (App. p. 50).

IMPORTANCE OF THE QUESTION

The consideration of this case by the Supreme Court is important in that there are presently nine (9) similar cases in the United States District Court for the Eastern District

of Texas, Beaumont Division; one (1) pending in the United States District Court for the Southern District of Texas, Houston Division; and nineteen (19) cases in various other United States District Courts in Colorado, Missouri, etc. (App. p. 94). There are at least 20,000 or more industrial workers who have been exposed to asbestos dust and who are potential claimants.

REASONS FOR GRANTING THE WRIT

1. The decision below holding that Borel did not have notice of the disease and danger of asbestosis is in conflict with the decisions of the Texas Supreme Court and intermediate Texas courts, the Fifth Circuit and other Circuits, and the holding of the Supreme Court of the United States, which in effect hold that Borel and his employers had notice as a matter of law of the disease and danger of asbestosis because Borel and his employers are conclusively presumed to know that the provisions of the Workmen's Compensation Statute of Texas, 8063, Sec. 20(n) and Sec. 26(a), specifying "asbestosis" as an occupational disease and defining "asbestosis" as: "xxx the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust."

In Texas law, it is recognized that ordinarily the diseases named as *occupational diseases are those acquired in the usual and ordinary course of an employment and those that from common expirence are recognized to be incidental to a particular employment*. xxx Tex. Jur. 2d Vol. 62, Para. 107, Page 682.

Borel was an asbestos insulator, he was a member of the Asbestos Workers Union, and at all times knew he was working with insulation products which contained some asbestos.

The Fifth Circuit holds that no notice of the danger of asbestosis from exposures to Petitioners' various products was given until 1964 and 1966, and such notices were inadequate. If Borel had notice or been given notice of the danger of asbestosis, there would be no liability under Texas law or under the Restatement of Torts, even though the product was "unreasonably dangerous" or an unavoidable unsafe product. Petitioners assert that as a matter of law Borel had notice and knowledge of the provisions of the Texas Workmen's Compensation Law; therefore, he had notice and knowledge of the occupational disease of asbestosis and its cause.

"Judicial notice" is cognizance of certain facts which judges and jurors may properly take and act on without proof because they already know them. *United States* v. *International Minerals and Chemical Corporation*, 402 U.S. 558, 29 L. Ed. 2d 178, 91 S. Ct. 1697.

Judicial notice is taken of the provisions of the Texas Workmen's Compensation Statute. All persons are conclusively presumed to know the law.[4]

The Supreme Court of Texas in *Stafford Manufacturing Company* v. *Wichita School Supply Company, et al* (1930),

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[4] Stafford Manufacturing Company v. Wichita School Supply Company, Comm. App. Tex., Opinion adopted by Sup. Ct. Tex., 23 S.W.2d 695, 697; Indemnity Insurance Company of North America v. Williams, Tex. Ct. Civ. App. 1934, 69 S.W.2d 519, 528; Consolidated Casualty Insurance Company v. Perkins, Sup. Ct. Tex. 1955, 279 S.W.2d 299, 302; Texas Employers Insurance Company v. Doss, Tex. Ct. Civ. App. 1957, 301 S.W.2d 473, err. ref. n.r.e.; Falls County v. Mires, Ct. Civ. App. Tex. 1949, 219 S.W.2d 491, err. ref. by Sup. Ct.; Kasch v. Anton, Tex. Ct. Civ. App. 1935, 81 S.W.2d 1097, 1100; Houston & T.C.R. Company v. Johnson, Tex. Comm. App. 1931, 41 S.W.2d 14; 23 Tex. Jur. 2d, Para. 73, Page 114.

23 S.W.2d, 695, 697, said: "The rule is too elementary to require the citation of authority that all persons are conclusively presumed to know the law."

In *Kasch* v. *Anton*, Tex. Ct. Civ. App., 1935, 81 S.W.2d 1097, 1100, the Court held: "However violent the presumption may be that every man knows the law, *it nevertheless conclusively prevails*. Such presumption applied as much to Flores or Anton, as it did to Kasch; *and it would be a strange doctrine of negligence to hold that Kasch was negligent in failing to tell Flores something* that he is in law conclusively presumed to know." The claim in the case was that Kasch was negligent in failing to instruct his servant, Flores, of the provisions of the law of the road.

In *Indemnity Insurance Company of North America* v. *Williams*, Ct. Civ. App. 1934, 69 S.W.2d 519, 528, the Court said: "Courts take judicial notice of public laws of the state and all facts therein recited."

In *Consolidated Casualty Insurance Company* v. *Perkins*, Supreme Court of Texas, 1955, 279 S.W.2d 299, 302, the Court was construing provisions of the Texas Workmen's Compensation Act, and said: "The respondent is presumed to know the law."

In *Houston and T.C.R. Company* v. *Johnson*, Tex. Comm. App. 1931, 41 S.W.2d 14, the Court said: "Johnson was charged with knowledge of the statutory provisions and of their legal effect." (The statute referred to freight charges)

In *Falls County* v. *Mires*, Ct. Civ. App., Tex. 1949, 218 S.W. 2d 491, err. ref., which means the opinion is approved by the Supreme Court, it is stated: "Everyone is chargeable with knowledge of statutory provisions of the law."

The Fifth Circuit case of *Meacham* v. *Holley*, 103 F. 2d 967, and *Beckert* v. *Holley*, 104 F. 2d 1010, cert. denied, 60

S. Ct. 816, held: "All persons are conclusively presumed to know the law."

In our case, Borel knew he was working with products which contained asbestos.[5] (Op., p. 3).

Petitioners assert that as a matter of law Borel had notice of the provisions of the Texas Workmen's Compensation Act which gave him notice of the occupational disease of asbestosis, and the knowledge that "asbestosis" means the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. Therefore, Borel had notice of the danger of asbestosis from exposure to asbestos dust as far back as 1947 when the Texas Statute was enacted. The Fifth Circuit discarded this contention, and held that the manufacturers owed each individual worker the duty to warn of the possible disease of asbestosis from such exposures to dust from its product.

Clearly, there is a conflict between the Opinion of the Fifth Circuit in this case, and the Texas cases by which the Court is "Erie bound."

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[5] "Borel said he had known for years that inhaling asbestos dust 'was bad for me' and that it was vexatious and bothersome, but he never realized it could cause any serious or terminal illness. xxx." He was a member of the Asbestos Workers Union. He testified he knew it was dangerous but he never knew how dangerous.

"Q. In other words, there was some question in your mind as to whether this was dangerous and whether it was bad for your health?

A. There was always a question, you just never know how dangerous it was. I never did know really. If I had known I would have gotten out of it.

Q. All right, then you did know it had some degree of danger but you didn't know how dangerous it was?

A. I knew I was working with insulation.

Q. Did you know that it contained asbestos?

A. Yes, sir, but I didn't know what asbestos was."

2. Whether the failure to submit an interrogatory or a form of verdict whereby the jury could pass upon the defendants' defense of "assumption of risk" deprived the defendants of their right to a trial by jury as guaranteed by the Constitution of the United States.

3. Defendants contend that this case was submitted on special interrogatories and not on a combination of special interrogatories and a general verdict. Therefore, the opinion fails to follow rule 49(a) that no finding may be made by the court on an omitted fact issue. The opinion is therefore in conflict with the decision of other opinions of the Fifth Circuit and an opinion of the Fourth Circuit Court of Appeals.

In this case, pursuant to Rule 49a, F.R.C.P., the Court requires the jury to return ONLY a special verdict in the form of answers to special written interrogatories. This is unequivocally established by the verdict of the jury, which consisted solely and alone of answers to five special interrogatories. The interrogatories and answers which constituted the verdict are shown on Pages 292-293 of the Appendix submitted with this application.

Special Interrogatory No. 1 inquired as to negligence on the part of each defendant proximately causing the injuries and death of the deceased. Special Interrogatory No. 2 submitted as to each defendant the question of gross negligence. Special Interrogatory No. 3 inquired as to whether the deceased was guilty of contributory negligence proximately causing his injuries and death, which was answered "Yes." Special Interrogatory No. 4 submitted the question of whether the defendant breached their warranties proximately causing the death, which were answered in the affirmative. Special Interrogatory No. 5 inquired as to what sum of money would reasonably compensate the

plaintiff for the damages sustained by reason of the death of her husband. At the conclusion of the interrogatories is found the following:

"VERDICT OF THE JURY

"We, the jury, return the above answers to the special interrogatories propounded to us herein as our verdict in this case.

9/29/71 s/ Roy L. Jenkins
FOREMAN OF THE JURY"

While the Court generally instructed the jury as to the defense of voluntary assumption of risk, it is thus evident that THERE WAS NO WAY for a jury by their verdict to determine this defense. There was no general form of verdict submitted to the jury and they returned none. The Fifth Circuit stated: "The trial court submitted this case to the jury on special interrogatories, not 'on general verdicts accompanied by special interrogatories as to Borel's contributory negligence,' as stated in the original opinion and as stated by defendants' counsel in objecting to certain portions of the jury trial." (Op. Reh. 3828), App. p. 60.

Rule 49(a), F.R.C.P., provides for the submission of a case to the jury on a special verdict such as was here done, and further, "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury on the issue so omitted, unless before the jury retires he demands its submission to the jury." Here the defendants in strict and full compliance with the rule filed a requested interrogatory submitting the defense, which was presented to the Court and overruled by the Court, copy of which is shown in the

Appendix, Page 161. Going even further, defendants submitted and called to the Court's attention their Requested Charge No. 11, Appendix, Page 197, setting forth the elements of the defense, which the Court refused, and finally defendants objected to the charge ". . . because there was no interrogatory submitted to the jury whereby they might answer and find in favor of the defendants based upon that defense (voluntary assumption of risk), and even though the jury may find and believe that all of the elements were established, there is still no way under the form of verdict as submitted to the jury whereby they could return a finding in favor of the defendants on that theory. We have specifically called the Court's attention to, I believe it was, our Requested Charge No. 11, which set out elements of that defense and would request the Court 'TO GIVE THE JURY A SPECIAL INTERROGATORY SO THAT THEY COULD ANSWER AND MAKE A FINDING SPECIFICALLY ON THAT DEFENSE.'"

By way of summary, defendants did everything required by the rules, and more, to preserve their right to a jury trial on the defense of voluntary assumption of risk.

The Court of Appeals on rehearing recognized the fact that the case was submitted to the jury on special interrogatories. The appellate court then discusses the GENERAL instructions in which the trial court instructed the jury as to the elements of the defense of voluntary assumption of risk, and then overrules defendant's contentions by concluding that the general instruction was favorable to the defendants, holding as follows:

> "What more could the defendant want? We considered the instruction overly favorable to the defendants. Notwithstanding, the jury still found against

> the defendants, IN EFFECT, therefore, finding that Borel did not assume the risk."

Thus, the Court of Appeals deprived the defendants of their constitutional right to a jury trial, not because the defense was actually submitted to the jury or determined by the jury, but on the ground that because the jury answered the special interrogatories as to (1) negligence, (2) gross negligence, (3) contributory negligence, (4) breach of warranty, (5) damages, that they were "IN EFFECT," also finding against the defendants on the defense of voluntary assumption of risk, which was not mentioned or even hinted at, in the interrogatories, the answers to which alone constituted the verdict in this case. Rule 49a, F.R.C.P., recognizes the parties' rights to a trial by jury and provides that such right can be preserved as to any fact issue raised by the pleadings or evidence by demanding the submission thereof exactly as was done here.

It is settled that when a case is submitted to the jury on special interrogatories, as here, the Court should submit and allow the jury to pass upon all disputed issues of fact and that when a party, as here, objects to the failure to submit any disputed issue, that then the Court cannot make a finding thereon and a new trial must be granted in order to preserve the parties' constitutional right of trial by jury. *Scott* v. *Isbrandsten Co.* (4th Cir. 1964), 327 F.2d. 113; *Palmiero* v. *Spada Distributing Co.* (9th Cir. 1954), 217 F.2d. 561; *Duke* v. *Sun Oil Co.* (5th Cir. 1963), 320 F.2d. 853. The Court's holding here is in conflict with these cases.

4. Whether the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved, and thereby deprived defendants of a trial by jury on this issue. (App. p. 188 — Request No. 18).

The Fifth Circuit said: "The defendants also contend that the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved. The trial court did, however, tell the jury that liability could not be imposed unless the product was 'unreasonably dangerous,' *a concept that necessarily implies a balancing of the products utility against the danger.*"

We submit that defendants were entitled to an instruction on the defense of the "utility of the product outweighing the danger involved," and the jury could not be assumed to have the knowledge that this defense was incorporated or implied from the use of the term "unreasonably dangerous."

This holding is in conflict with the opinion in *McGrath v. Wallace Murray Corporation*, U. S. Ct. App. 10th Cir., 1974, CCH. Products Liability Reports, Pg. 12,823, Para. 7169 (5-15-74), and cases therein cited holding that the failure to submit a principal defense theory in the instructions is reversible error. The defense was failure of plaintiff to use a guard while using the abrasive wheel as a defense to strict liability.

The defence of the utility of the products containing some asbestos outweighing the danger was an important one which the jury was not allowed to consider.

5. The ex post facto application of strict liability in tort under Section 402A, Restatement of Torts, 2nd. Ed., (adopted in 1965), and adopted by Texas Courts in 1967, to occupational exposures to products containing asbestos by Borel commencing in 1936, is in conflict with opinions of the Supreme Court of Texas in McKisson v. Sales Affiliates, Inc. (1967) 416 S.W. 2d 787, and Howle v. Camp Amon Carter (Tex. 1971), 470 S.W. 2d 629, and Pittsburgh Coca-Cola Bottling Works v. Ponder, 433 S.W. 2d 546, 548 (Tex. 1969), and is in violation of the Constitution of the State of Texas, Article I, Section 16.

Borel commenced work as an asbestos insulation worker in 1936 in shipyards, performing original and repair work in holds of vessels built by contractors for the United States Government. Borel worked in such shipyards over a period of three or four years, working in close quarters and inhaling large amounts of asbestos dust. The record is silent as to the names of the manufacturers of the asbestos insulating materials utilized in shipbuilding during the war years. Thereafter, Borel worked for numerous independent insulation contractors in which products of one or more of Petitioners were used from time to time, until the institution of the instant suit.

The State of Texas had in full force and effect from 1947 to the present time an occupational disease statute under workmen's compensation providing for benefits caused by asbestosis contracted on the job; nevertheless, the Fifth Circuit held Petitioners, who were manufacturers of insulation products and had no control over working conditions of Borel and workers similarly employed, strictly liable in tort under Section 402A of the Restatement of the Law of Torts (2nd Ed.) which was not adopted by Restatement until 1965, and which rule of strict liability was not

adopted in the State of Texas until 1967 as to products other than food. *McKisson* v. *Sales Affiliates, Inc.*, 416 S.W. 2d 787 (Tex. 1967). No Texas Court has held the doctrine enunciated in *McKisson* v. *Sales Affiliates, Inc.*, supra, retroactively applicable to events and acts occurring before the date of the decision of the Texas Supreme Court in June, 1967.

Prior to the *McKisson* case, the Texas Supreme Court expressly refused to extend the doctrine of strict liability to manufacturers of non-food products. *Cruz* v. *Ansul Chemical Company*, 399 S.W. 2d 944 (Tex. Civ. App. — Corpus Christi 1966, writ ref'd n.r.e.); *Brown* v. *Howard*, 289 S.W. 2d 752 (Tex. Civ. App. — San Antonio 1955, writ ref'd n.r.e.).

In 1967, the Supreme Court of Texas abruptly changed the direction of the law in Texas when it adopted the rule of strict liability in the *McKisson* case, supra. In *Pittsburg Coca-Cola Bottling Works* v. *Ponder*, 443 S.W. 2d 546, 548 (Tex. 1969), the Court gives a condensed history of the evolution of this phase of the law when it said:

> "Our approach to use of the rule for imposing liability on sellers of products has been gradualistic and marked with caution. Some twenty-seven years ago, we adopted the rule as a means of fixing liability on manufacturers and packagers of food products for human consumption. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W. 2d 828, 142 A.L.R. 1479 (1942), and on retain purveyors thereof, Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W. 2d 835, 142 A.L.R. 1424 (1942); but a decade later, we questioned the wisdom of applying the rule to retailers of food products, canned or packaged by others, and we refused to apply it to wholesalers of such products. Bowman Biscuit Co. of Texas v. Hines, 151 Tex. 370, 251 S.W. 2d 153 (1952). Then, in 1956, with the question squarely presented,

we refused to grant a writ in Brown v. Howard, 285 S.W. 2d 752 (Tex. Civ. App. — San Antonio, 1956, writ ref'd n.r.e.), and thus refused to apply the rule to a manufacturer of a spray causing harm when used on the plaintiff's cattle.

"In 1967, we finally yielded to the irrefutable logic that the rule of strict liability is the only practical vehicle for protecting the public against harm so often encountered by innocent users and consumers of defective products. *We abruptly changed direction.* In McKisson v. Sales Affiliates, Inc., 416 S.W. 2d 787 (Tex. Sup. 1967), we applied the rule against a distributor of a permanent wave lotion which proved harmful when applied to a woman's hair and scalp. In that case, we committed the court to the rule of strict liability expressed in Section 402A of The American Law Institute's Restatement of the Law of Torts (2d Ed.) as applicable to all persons engaged in the business of selling who sell a product in a defective condition which renders it unreasonably dangerous to a user or consumer or to his property. *The necessary effect of McKisson was to disapprove prior contrary expressions of the law* as announced in Bowman Biscuit Co. v. Hines, supra, and Brown v. Howard, supra." (Emphasis added).

In *McKisson*, supra, the strict liability doctrine was applied to the parties before the Court, but the Court did not determine whether the new rule it adopted would operate retroactively or only prospectively as to other cases.

The Texas Supreme Court recently recognized that probable reliance by potential defendants warranted prospective application of the court-made rule abolishing charitable immunity rather than giving retroactive effect to such opinion. *Watkins* v. *Southcrest Baptist Church*, 399 S.W. 2d 530 (Tex. 1966), *Howle* v. *Camp Amon Carter*, 470 S.W. 2d 629, 1971.

In *Watkins* v. *Southcrest Baptist Church*, 399 S.W.2d 530, 535, the Supreme Court of Texas sustained the court-made rule of charitable immunity but gave notice that from and after the date of the opinion "that the doctrine of charitable immunity will not be recognized in cases hereafter arising."

In *Hoard* v. *Camp Amon Carter*, 470 S.W.2d. 629 (1971), the Texas Supreme Court in a case involving the charitable immunity doctrine, said:

> "The several opinions in *Watkins* gave ample notice that the doctrine of charitable immunity would be reconsidered and might well be abrogated. It is now completely abrogated with respect to causes of action arising from events *occurring after* the motion for rehearing in *Watkins* was overruled on March 9, 1966."

Thus, the Supreme Court of Texas recognized the probable reliance by potential defendants of the defence of charitable immunity and in abolishing the court-made doctrine made its ruling applicable prospectively. Numerous other Courts follow the prospective application of court-made law.[6]

It is submitted that the Federal Courts should ascertain and follow the position that the Texas Supreme Court would

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[6] Abernathy v. Sisters of St. Mary's, 447 S.W.2d 599 (Mo. 1969), (abolishing the doctrine of charitable immunity); Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1956); Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965) *cert. denied* 383 U.S. 946, 86 S. Ct. 1204, 16 L. Ed. 2d 209 (1966); Thoen v. Hatton, 287 Minn. 545, 177 N.W.2d 815 (1970), (overruling the rule that the wife had no cause of action for loss of husband's consortium, and holding that such decision would operate prospectively); Spanel v. Moundsview School District, 261 Minn. 279, 118 N.W.2d 795 (1962) (abolishing the doctrine of sovereign immunity for school districts prospectively); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), (abolishing the doctrine of governmental immunity prospectively).

probably take on the retroactive application of the rule of strict liability in tort adopted in *McKisson*. Since the Texas Supreme Court has given the condensed history of the evolution of strict liability in *Pittsburg Coca-Cola* v. *Ponder* and refused to apply the abolition of the rule of charitable immunity retroactively, it is evident that the Texas Supreme Court would not apply the rule of strict liability in tort to non-food products retroactively to 1936. The Federal Courts should attempt to decide the matter as a Texas Court would — "in effect, sitting as a State Court." *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 465, 87 S. Ct. 1776, 1782-83, 18 L. Ed. 2d 886, 894 (1967). In determining the question, the Federal Courts should take into account all the authorities which would be persuasive to the State Court. *Roginsky* v. *Richardson-Merrill, Inc.*, 378 F. 832, 851 (2nd Cir. 1967).

Another impelling reason why this rule by the Texas Supreme Court in *McKisson* in 1967 should not be applied retroactively is Article I, Section 16 of the *Texas Constitution*:

> "Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Vernon's Texas Constitution, Volume 1, Page 371. See Commentary, Page 372.[7]

[7] "The Texas Constitution goes further than the United States Constitution for the former is not confined to forbidding ex post facto laws, i.e., retroactive and penal legislation, but it also lays a ban on any retroactive law. In prohibiting retroactive laws, the Texas Constitution seeks to safeguard rights not guaranteed by other constitutional provisions such as the impairment of the obligation of contracts and due process of law clauses. Mellinger v. City of Houston, 68 T. 37, 3 S.W. 249 (1887).

"A retroactive law is one meant to act on things that are past. As such, a statute is retroactive which takes away or impairs vested rights acquired under existing laws, or creates new obli-

Under principles governing the retroactive application of an overruled decision, it seems clear that the Texas Supreme Court, as well as the majority of jurisdictions in other States, would not hold the *McKisson* strict liability doctrine retroactively applicable, and particularly with respect to events occurring before June 7, 1967.

In summary, the opinion of the Fifth Circuit in the case at bar holds that an employee may recover from manufacturers of asbestos products for an occupational disease contracted from exposures beginning in 1936, even though up to 1967 he had no cause of action cognizable under Texas law against the manufacturers. Such decision is contrary to Texas law. Further, recovery is allowed under the strict liability in tort despite the fact that the applicable Workmen's Compensation Statutes of Texas grant a remedy for becoming incapacitated as a result of the occupational disease.

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gations, imposes new duties, or adopts a new disability in respect to transactions or considerations already past, and which affects acts or rights accruing before it came into force. Turbeville v. Gowdy, Civ. App. 272 S.W. 559 (1925)."

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted;

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. .....

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL.,
Petitioners,

v.

CLARENCE BOREL,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 1974, three copies of the Petition for Writ of Certiorari were mailed by Certified Mail, postage prepaid, to the Honorable Marlin Thompson, Stephenson & Thompson, Attorneys, Stephenson Building, Orange, Texas, 77630, counsel for Respondent, and three (3) copies were mailed by Certified Mail, postage prepaid, to the Honorable George E. Murphy, San Jacinto Building, Beaumont, Texas, counsel for Intervenor. I further certify that all parties required to be served have been served.

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A-1

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APPENDIX

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1. Opinion of the Fifth Circuit dated September 10, 1973, 493 F. 2d 1076.

2. Opinion of the Fifth Circuit on Motion for Rehearing entered May 13, 1974.

3. Copy of Article 8306, Sec. 20(n), and Article 8306, Sec. 26, Revised Civil Statutes of Texas.

4. Opinion Ct. Civ. App. Tex., Kasch v. Anton, 81 S.W. 2d 1097, 1100.

5. Copy of The Asbestos Worker, October, 1956.

6. Copy of The Asbestos Worker, July, 1957.

7. Copy of The Asbestos Worker, November, 1961.

8. Copy of The Asbestos Worker, April, 1957.

9. Affidavit re other cases involving claims for damages resulting from asbestos exposure.

10. List of other cases pending.

11. Opinion, Sup. Ct. Tex., Pittsburg Coca-Cola Bottling Works v. Ponder (1969), 443 S.W. 2d 546, 548.

12. Opinion, Sup. Ct. Tex., Howle v. Camp Amon Carter (Tex. 1971), 470 S.W. 2d 629.

13. Opinion, Sup. Ct. Tex., McKisson v. Sales Affiliates, Inc. (Tex. 1967), 416 S.W. 2d 787.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1492

CLARENCE BOREL,

Plaintiff-Appellee,

v.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL.,

Defendants-Appellants,

NATIONAL SURETY CORPORATION,

Intervenor-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

(September 10, 1973)
493 F.2d 1076

Before TUTTLE, WISDOM and SIMPSON,
Circuit Judges.

WISDOM, Circuit Judge: This product liability case involves the scope of an asbestos manufacturer's duty to warn industrial insulation workers of dangers associated with the use of asbestos.

Clarence Borel, an industrial insulation worker, sued certain manufacturers of insulation materials containing asbestos to recover damages for injuries caused by the defendants' alleged breach of duty in failing to warn of the dangers involved in handling asbestos. Borel alleged that

he had contracted the disease of asbestosis and mesothelioma as a result of his exposure to the defendants' products over a thirty-three year period beginning in 1936 and ending in 1969. The jury returned a verdict in favor of Borel on the basis of strict liability. We affirm.

I.

Clarence Borel began working as an industrial insulation worker in 1936. During his career, he was employed at numerous places, mostly in Texas, until disabled by the disease of asbestosis in 1969. Borel's employment necessarily exposed him to heavy concentrations of asbestos dust generated by insulation materials. In his pre-trial disposition, Borel testified that at the end of a day working with insulation material containing asbestos his clothes were usually so dusty he could "just barely pick them up without shaking them." Borel stated: "You just move them a little and there is going to be dust, and I blowed this dust out of my nostrils by handfuls at the end of the day, trying to use water too, I even used Mentholatum in my nostrils to keep some of the dust from going down in my throat, but it is impossible to get rid of all of it. Even your clothes just stay dusty continually unless you blow it off with an air hose."

Borel said that he had known for years that inhaling asbestos dust "was bad for me" and that it was vexatious and bothersome, but that he never realized that it could cause any serious or terminal illness. Borel emphasized that he and his fellow insulation workers thought that the dust "dissolves as it hits your lungs". He said:

> A. Yes, I knew the dust was bad but we used to talk [about] it among the insulators, [about] how bad was this dust, could it give you TB, could it give you this, and everyone was saying no, that dust

don't hurt you, it dissolves as it hits your lungs. That was the question you get all the time.

Q. Where would you have this discussion, in your Union Hall?
A. On the jobs, just among the men.

Q. In other words, there was some question in your mind as to whether this was dangerous and whether it was bad for your health?
A. There was always a question, you just never know how dangerous it was. I never did know really. If I had known I would have gotten out of it.

Q. All right, then you did know it had some degree of danger but you didn't know how dangerous it was?
A. I knew I was working with insulation.

Q. Did you know that it contained asbestos?
A. Yes, sir, but I didn't know what asbestos was.

When asked about the use of respirators, Borel replied that they were not furnished during his early work years. Although respirators were later made available on some jobs, insulation workers usually were not required to wear them and had to make a special request if they wanted one. Borel stated that he and other insulation workers found that the respirators furnished them were uncomfortable, could not be worn in hot weather, and — "you can't breathe with the respirator." Borel further noted that no respirator in use during his lifetime could prevent the inhalation of asbestos dust. As an alternative precaution, therefore, he would sometimes wear a wet handkerchief over his nostrils or apply mentholatum, but these methods were also unsatisfactory and did not exclude all the dust.

Borel stated that throughout his early working life and until the mid-1960's he was in good health, except for pains caused by lung congestion that his doctor attributed to pleurisy. In 1964, a doctor examined Borel in connection

with an insurance policy and informed him that x-rays of his lung were cloudy. The doctor told Borel that the cause could be his occupation as an insulation worker and therefore advised him to avoid asbestos dust as much as he possibly could.

On January 19, 1969, Borel was hospitalized and a lung biopsy performed. Borel's condition was diagnosed as pulmonary asbestosis. Since the disease was considered irreversible, Borel was sent home. Borel testified in his deposition that this was the first time he knew that he had asbestosis.

Borel's condition gradually worsened during the remainder of 1969. On February 11, 1970, Borel underwent surgery for the removal of his right lung. The examining doctors determined that Borel had a form of lung cancer known as mesothelioma, which had been caused by asbestosis. As a result of these diseases, Borel later died before the district case reached the trial stage.

The medical testimony adduced at trial indicates that inhaling asbestos dust in industrial conditions, even with relatively light exposure, can produce the disease of asbestosis.[1] The disease is difficult to diagnose in its early stages because there is a long latent period between initial exposure and apparent effect. This latent period may vary according to individual idiosyncrasy, duration and intensity of exposure, and the type of asbestos used. In some cases, the disease may manifest itself in less than ten years after initial exposure. In general, however, it does not manifest itself until ten to twenty-five or more years after initial exposure. This latent period is explained by the

[1] For a discussion of asbestosis and its effect on industrial insulation workers, see Selikoff, Bader, Bader, Churg and Hammond, Asbestos and Neoplasia, 42 Am. J. Med. 487 (1967); Selikoff, Churg, and Hammond, The Occurrence of Asbestosis Among Insulation Workers, 132 Ann. New York Acad. Sc. 139 (1965).

fact that asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible. Even if no additional asbestos fibers are inhaled, tissue changes may continue undetected for decades. By the time the disease is diagnosable, a considerable period of time has elapsed since the date of the injurious exposure. Furthermore, the effect of the disease may be cumulative since each exposure to asbestos dust can result in additional tissue changes. A worker's present condition is the biological product of many years of exposure to asbestos dust, with both past and recent exposures contributing to the overall effect. All of these factors combine to make it impossible, as a practical matter, to determine which exposure or exposures to asbestos dust caused the disease.

A second disease, mesothelioma, is a form of lung cancer caused by exposure to asbestos. It affects the pleural and peritoneal cavities, and there is a similarly long period between initial contact and apparent effect. As with asbestosis, it is difficult to determine which exposure to asbestos dust is responsible for the disease.[2]

At issue in this case is the extent of the defendants' knowledge of the dangers associated with insulation products containing asbestos. We pause, therefore, to summarize the evidence relevant to this question.

Asbestosis has been recognized as a disease for well over fifty years.[3] The first reported cases of asbestosis were

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[2] *Id.*

[3] Asbestos has been known to man since ancient times. As a generic term, it applies to a number of inorganic, fibrous, silicate minerals that possess a crystaline structure. Asbestos is incombustible in air and separable into filaments. It was used as an insulator against heat as early as 1866, and asbestos cement was introduced about 1870. Asbestos insulation material has been commercially produced since at least 1874.

among textile workers. In 1924, Cooke in England discovered a case of asbestosis in a person who had spent twenty years weaving asbestos textile products.[4] In the next decade, numerous similar cases were observed and discussed in medical journals. An investigation of the problem among textile factory workers was undertaken in Great Britain in 1928 and 1929.[5] In the United States, the first official claim for compensation associated with asbestos was in 1927.[6] By the mid-1930's, the hazard of asbestosis as a pneumoniotic dust was universally accepted.[7] Cases of

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[4] Cooke, Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust, 2 Brit. Med. J. 147 (1924); Cooke, Pulmonary Asbestosis, 2 Brit. Med. J. 1024 (1927).

[5] Merewether and Price, Report on the Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry (1930).

[6] Lanza, Asbestosis, 106 J. A. M. A 368 (1936).

[7] H. R. Rep. No. 14316, 90th Cong., 2d Sess. 349, 355 (1968). Dr. I. J. Selikoff of the School of Environmental Sciences; Laboratory, Mount Sinai School of Medicine, City University of New York, stated:

> In 1924, which is a little over 40 years ago, Dr. Cooke in England described a case of a woman dying of severe lung scarring who had spent 20 years in a textile factory, weaving asbestos, and in the next decade many similar cases were reported, so that by the mid-1930's the hazard of asbestos as a pneumoconiotic dust was pretty universally accepted.
>
> Textile factories in this country, most of them in the southern part of our country, were also studied and our Public Health Service fully documented the very significant risks involved in asbestos textile factories and a classic report by Dreessen and his colleagues which was published by the GPO in 1938. Precautionary measures were urged in this report and elimination of hazardous exposures were strongly recommended.
>
> As I sit here now, I am unhappy to say that unfortunately implementation of these recommendations has been haphazard and inadequate and that conditions and dangers so well recognized and so well described 40 years ago are still with us. It is an unhappy reflection on all of us — government, public health authorities, and my own medical profession — that at this time in the United States in the 1960's 7 percent of all deaths among insulation workers in this country are due to a completely preventable cause, pulmonary asbestosis.

asbestosis in insulation workers were reported in this country as early as 1934.[8] The U.S. Public Health Service fully documented the significant risk involved in asbestos textile factories in a report by Dreessen, et al., in 1938.[9] The authors urged precautionary measures and urged elimination of hazardous exposures.

The first large-scale survey of asbestos insulation workers was undertaken in the United States by Fleischer-Drinker, et al., in 1945.[10] The authors examined insulation workers in eastern Navy shipyards and found only three cases of asbestosis. They concluded that "asbestos covering of naval vessels is a relatively safe operation." Significantly, ninety-five percent of those examined had worked at the trade for less than ten years. Since asbestosis is usually not diagnosable until ten to twenty years after initial exposure, the authors' conclusion has been criticized as misleading.[11] Perhaps recognizing this possibility, the authors cautioned that the study did not "give a composite picture of the asbestos dust that a worker may breathe over a period of years", and that "if pipecoverers had worked steadily [under conditions] where the amount of asbestos dust in the air was consistently high, the incidence of asbestosis among these workers would have been considerable greater." The authors stated that "the suggestions relative to exhaust ventilation and respiratory protection are there-

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[8] Ellman, Pneumoconiosis, 14 Brit. J. Radiol. 361 (1934).

[9] Dreessen et al., A Study of Asbestosis in the Asbestos Textile Industry, Public Health Bull. No. 241 (1938).

[10] Fleischer, Viles, Gade and Drinker, A Health Survey of Pipe-Covering Operations in Constructing Naval Vessels, 28 J. Indust. Hyg. 9-16.

[11] Selikoff, et al, Asbestosis and Neoplasia, 42 Am. J. Med. 487 (1967).

fore of value in maintaining this low incidence of asbestosis".[12]

In 1947, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial hygiene, issued guidelines suggesting threshold limit values for exposure to asbestos dust. In its first report, the ACGIH recommended that there should be no more than five million parts per cubic foot of air. It later determined in 1968 that the threshold limit value should be reduced to two million.[13]

Throughout the 1950's and 1960's, further studies and medical reports on asbestosis were published. In 1965, I. J. Selikoff and his colleagues published a study entitled "The Occurrence of Asbestosis Among Insulation Workers in the United States."[14] The authors examined 1,552 members of an insulation workers union in the New York-New Jersey metropolitan area. Evidence of pulmonary asbestosis was

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[12] Fleischer, *supra* note 10 at 15.

[13] *See* Documentation of the Threshold Limit Values for Substances in Workroom Air, A.C.G.I.H. (3ed 1971). The A.C.G.I.H. has described the threshold limit values as "conditions under which it is believed that nearly all workers may be repeatedly exposed, day after day, without adverse effect. The values listed refer to time-weighted average concentrations for a normal workday. The amount by which these figures may be exceeded for short periods without injury to health depends upon a number of factors such as the nature of the contaminant, whether very high concentrations even for short periods produce acute poisoning, whether the effects are cumulative, the frequency with which high concentrations occur, and the duration of such periods."

See Threshold Limit Values for 1961, A.C.G.I.H. (1961).

[14] Selikoff, Churg, and Hammond, The Occurrence of Asbestosis Among Industrial Insulation Workers, 132 Ann. New York Acad. Sc. 139 (1965).

found in almost half of the men examined. Among those with more than forty years experience, abnormalities were found in over ninety percent. The authors concluded that "asbestosis and its complications are significant hazards among insulation workers".[15] Other studies have since confirmed these findings.[16]

The plaintiff introduced evidence tending to establish that the defendant manufacturers either were, or should have been, fully aware of the many articles and studies on asbestosis. The evidence also indicated, however, that during Borel's working career no manufacturer ever

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[15] The authors state:

> Among the asbestos insulation workers examined by us, evidence of pulmonary asbestosis was present in almost half the men examined. In this evaluation, radiological change has been used as the sole criteria. (See Table 5) We understand, of course, that evaluation of the presence and extent of asbestosis limited only to X-ray findings tends to result in underestimation of the incidence of asbestosis, but few instances of disabling disease will be so overlooked. Analysis of our data indicates that radiologically evident pulmonary asbestosis varied directly with the duration of exposure. Insulation workers with relatively short periods of exposure have a significantly lower incidence of pulmonary asbestosis and this, when present, was generally of minimal extent.
>
> Of 346 men whose exposure had begun less than ten years before examination, only 36 or 10.4 per cent showed any radiological abnormality. In each of these cases, the reticular infiltration was minimal in extent and in none was there evidence of pleural calcification. In only four was pleural fibrosis seen. Of 379 men whose exposure had begun from 10 to 19 years before examination, more than half still had normal X-rays. Some abnormality was seen on X-ray in 167 of these cases but only nine was the asbestosis greater than minimal. In 35 of these men there was some pleural fibrosis and in five, evidence of calcification.
>
> On the other hand, among the 392 men with more than 20 years elapsed from onset of exposure, the very large majority had X-ray evidence of pulmonary asbestosis. Among the 77 whose exposure began from 20 to 29 years prior to examination, 56 showed abnormal films. Among 194 whose

warned contractors or insulation workers, including Borel, of the dangers associated with inhaling asbestos dust or informed them of the ACGIH's threshold limit values for exposure to asbestos dust. Furthermore, no manufacturer ever tested the effect of their products on the workers using them or attempted to discover whether the exposure of insulation workers to asbestos dust exceeded the suggested threshold limits.

On October 20, 1969, Borel initiated the present diversity action in the United States District Court for the Eastern District of Texas. Borel named as defendants eleven manufacturers of asbestos insulation materials used by him during his working career. He settled with four

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examination took place from 30 to 39 years following onset of exposure, almost 9 of 10 showed abnormal films while, of those with more than 40 years from onset of exposure only one in 20 showed no abnormality. Moreover, the asbestosis in these cases tended to be considerably more extensive and several and pleural calcification and fibrosis were commonly seen.

TABLE 5

X-RAY CHANGES IN ASBESTOS INSULATION WORKERS

Onset of exposure (yrs.)	No.	% Normal	% Abnormal	Asbestosis (grade) 1	2	3
40 +	121	5.8	94.2	35	51	28
30-39	194	12.9	87.1	102	49	18
20-39	77	27.2	72.8	35	17	4
10-19	379	55.9	44.1	158	9	0
0-9	346	89.6	10.4	36	0	0
	1,117	51.5	48.5	366	126	50

Selikoff, et al, *supra* note 15 at 147.

[16] Recognition of the grave occupational health problem posed by asbestos and other toxic and physically harmful substances has led to the passage of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, 84 Stat. 1590. The Act gives the Secretary of Labor the authority to establish standards for permissible concentrations of airborn asbestos fibers.

defendants before trial. The trial court instructed a verdict as to a fifth. The remaining defendants were: Fibreboard Paper Products Corporation, Johns-Manville Products Corporation, Pittsburgh Corning Corporation, Philip Carey Corporation, Armstrong Cork Corporation, and Ruberoid Corporation, a Division of GAF Corporation.[17] Borel died before trial and his widow was substituted as plaintiff under the Texas wrongful death statutes. Tex. Rev. Civ. Stat. arts. 4671, 5525.

The plaintiff sought to hold the defendants liable for negligence, gross negligence, and breach of warranty or strict liability. The negligent acts alleged in the complaint were: (1) failure to take reasonable precautions or to exercise reasonable care to warn Borel of the danger to which he was exposed as a worker when using the defendants' asbestos insulation products; (2) failure to inform Borel as to what would be safe and sufficient wearing apparel and proper protective equipment and appliances or method of handling and using the various products; (3) failure to test the asbestos products in order to ascertain the dangers involved in their use; and (4) failure to remove the products from the market upon ascertaining that such products would cause asbestosis. The plaintiff also alleged that the defendants' products were unreasonably dangerous because of the failure to provide adequate warnings of the foreseeable dangers associated with them.

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[17] The original complaint also named as defendents Owens-Corning Fiberglass Corporation, Standard Asbestos Manufacturing and Insulating Company, Unarco Industries, Ins., Eagle-Picher Industries, Inc., and Combustion Engineering, Inc. The first four firms settled before trial. The trial court instructed a verdict in favor of Combustion Engineering, Inc., because the plaintifff had failed to show that he had been exposed to any product of that company.

The defendants denied the allegations in the plaintiff's complaint and interposed the defenses of contributory negligence and assumption of risk.

The trial court submitted the case to the jury on general verdicts accompanied by a special interrogatory as to Borel's contributory negligence. As to the negligence count, the jury found that all the defendants, except Pittsburgh and Armstrong, were negligent but that none of the defendants had been grossly negligent. It found also, however, that Borel had been contributorily negligent.

As to the strict liability count, the jury found that all the defendants were liable and determined that the total damages were $79,436.24. Since four defendants originally named in the complaint had previously settled, paying a total of $20,902.20, the trial court gave full credit for the sums paid in settlement and held the remaining six defendants jointly and severally liable for the balance of $58,534.04. The defendants appealed.

II.

At the outset, we meet the question whether the trial court properly instructed the jury on strict liability. Since federal jurisdiction is based on diversity of citizenship, the substantive law of the forum state, Texas, controls. *Erie R.R. Co.* v. *Thompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

Under Texas law, a manufacturer of a defective product may be liable to a user or consumer in either warranty or tort.[18] With respect to personal injuries caused by a defec-

[18] The Restatement (Second) of Torts and its Reporter at the time Section 402A was drafted, Professor Prosser, in his writings, treated breach of implied warranty not in the language of con-

tive product, the Texas Supreme Court has adopted the theory of strict liability in tort as expressed in section 402A of the Restatement (Second) of Torts (1964).[19] *McKisson* v. *Sales Affiliates, Inc.*, 1967, 416 S.W.2d 787; *Shamrock Fuel & Oil Sales Co.* v. *Tanks*, 1967, 416 S.W.2d 779; *Texsun Feed Yards, Inc.* v. *Ralston Purina Co.*, 5 Cir. 1971, 447 F.2d 660. Section 402A provides, in relevant part: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate consumer or user".

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tractural warranty but in the language of strict liability in tort. *See* Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099, 1126-1127 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 804-05 (1966). Typically, in Greeno v. Clark Equipment Co., N.D. Ind. 1965, 237 F. Supp. 427, 429, the court noted that strict liability in tort as imposed by section 402A of Restatement (Second) of Torts (1965) is

> "hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation through inconsistencies with express warranties."

[19] "§ 402A. Special liability of Seller of Product for Physical Harm to User or Consumer.

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractural relation with the seller.

Under the *Restatement*, liability may not be imposed merely because a product involves some risk of harm or is not entirely safe for all uses. Products liability does not mean that a seller is an insurer for all harm resulting from the use of his product. Rather, a product is "defective" under the *Restatement* only if it is "unreasonably dangerous" to the ultimate user or consumer.[20] The requirement that the defect render the product "unreasonably dangerous" reflects a realization that many products have both utility and danger. The determination that a product is unreasonably dangerous, or not reasonably safe, means that, on balance, the utility of the product does not outweigh the magnitude of the danger. *See Helene Curtis Industries, Inc.* v. *Pruitt*, 5 Cir. 1967, 385 F.2d 841: James, Products Liability, 33 Tex. L. Rev. 114 (1955); Wade, Strict Tort Liability of Manufacturers, 19 S.W.L.J. 5, 15 (1965); Keeton, Products Liability-Inadequacy of Information, 48 Tex.L.Rev. 398, 403 (1970). The fulcrum for this balancing process is the reasonable man as consumer or as seller. Thus, a product is unreasonably dangerous only when it is "dangerous to an extent beyond that contemplated by the ordinary consumer who purchases it." Restatement (Second) of Torts, § 402A, comment i. In other words, for a product to be unreasonably dangerous, "it must be so dangerous that a reasonable man would not sell the product if he knew the risk involved".[21] *Helene*

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[20] As used in the Restatement, "defective" means "unreasonably dangerous"; it has no independent significance. *See* Wade, Strict Tort Liability of Manufacturers, 19 S.W.L.J. 5, 14-15 (1965).

[21] The consumer-oriented standard in the *Restatement* is essentially identical to the seller-oriented standard in Helene Curtis Industries ,Inc. v. Pruitt, *supra*. In Welch v. Outboard Marine Corp., 5 Cir. 1973,. .... F.2d..... [No. 72-1974, April 20, 1973] we said:

> We see no necessary inconsistency between a seller-oriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same

Curtis Industries, Inc. v. *Pruitt*, 385 F.2d at 850. *See* Wade, *supra* at 15; Keeton, Products Liability-Liability Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 855, 859 (1963).

Here, the plaintiff alleged that the defendants' product was unreasonably dangerous because of the failure to give adequate warnings of the known or knowable dangers involved. As explained in comment j to section 402A, a seller has a responsibility to inform users and consumers of dangers which the seller either knows at the time the product is sold. The requirement that the danger be reasonably forseeable, or scientifically discoverable, is an important limitation of the seller's liability.[22] In general, "[t]he rule of strict liability subjects the seller to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the products". Section 402A, Comment a. This is not the case where the product is alleged to be unreasonably dangerous because of a failure to give adequate warnings. Rather, a seller is under a duty to warn of only those dangers that are reasonably foresee-

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standard. A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect. As Dean Wade has pointed out, since the test for imposing strict liability is whether the product was "not reasonably safe", this test characterizes the seller's or manufacturer's conduct as well as the product. If the defendant has actual or constructive knowledge of the condition of the product, it would be unreasonable for him to sell it. Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 15 (1965).

[22] Several commentators, including Dean Kenton, have argued that the seller should be strictly liable if the sale of the product is under circumstances that would subject someone to an unreasonable risk in fact. Under this standard, the fact that the maker was excusably unaware of the extent of the danger would be irrelevant. *See* Keeton, P., Inadequacy of Information, 48 Tex. L. Rev. 398, 404, 409 (1970).

able. The requirement of foreseeability coincides with the standard of due care in negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product *and to warn users and consumers of that danger. Davis* v. *Wyeth Laboratories, Inc.*, 9 Cir. 1968, 399 F.2d 121. *See Basko* v. *Sterling Drug, Inc.*, 2 Cir. 1969, 416 F.2d 417, 427.

As the plaintiff has argued, insulation materials containing asbestos may be viewed as "unavoidably unsafe products". As explained in comment k to section 402A of the *Restatement*, "unavoidably unsafe products" are those which, in the present state of human knowledge, are incapable of being made safe for their ordinary and intended use. Strict liability may not always be appropriate in such cases because of the important benefits derived from the use of the product. This is especially so with respect to new drugs that are essential in treating disease but involve a high degree of risk.[23] It may also be so with respect to other commercial products possessing both unparalleled utility and unquestioned danger. As a practical matter, the decision to market such a product requires a balancing of the product's utility against its known or foreseeable danger. But, as comment k makes clear, even when such balancing leads to the conclusion that marketing is justified, the seller still has a responsibility to inform the user or consumer of the risk of harm. The failure to give adequate warnings in these circumstances renders the product unreasonably dangerous. See *Alman Bros. Farm & Feed Mill, Inc.* v. *Diamond Lab. Inc.*, 5 Cir. 1971, 437 F.2d 1295; *Davis* v. *Wyeth Laboratories, Inc.*, 9 Cir. 1968, 399 F.2d 121; *Basko* v. *Sterling Drug, Inc.*, 2 Cir. 1969, 416 F.2d 417;

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[23] *See* Merrill, Compensation for Prescription Drug Injuries, 59 Va. L. Rev. 1, 20-50 (1973); Keeton, P., Products Liability-Drugs and Cosmetics, 25 Vand. L. Rev. 137 (1972).

Sterling Drug, Inc. v. *Yarrow*, 8 Cir. 1969, 408 F.2d 978; *Sterling Drug* v. *Cornish*, 8 Cir. 1966, 370 F.2d 82. The rationale for this rule is that the user or consumer is entitled to make his own choice as to whether the products' utility or benefits justify exposing himself to the risk of harm. Thus, a true choice situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.

In *Davis* v. *Wyeth Laboratories, Inc.*, for example, the defendant manufacturer sold polio vaccine without warning of the statistical risk that one person in a million would contract polio by taking the vaccine. The court held that the manufacturer had a duty to warn the consumer of the risks involved and that the failure to meet this duty rendered the drug "unfit" and "unreasonably dangerous" within the meaning of section 402A. The court stated:

> In such cases, then, the drug is fit and its danger is reasonable only if the balance is struck in favor of its use. Where the risk is otherwise known to the consumer, no problem is presented, since choice is available. Where not known, however, the drug can properly be marketed only in such fashion as to permit the striking of the balance; that is, by full disclosure of the existence and extent of the risk involved.
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> There will, of course, be cases where the personal risk, although existent and known, is so trifling in comparison with the advantage to be gained as to be de minimus. Appellee so characterizes this case. It would approach the problem from a purely statistical point of view: less than one out of a million is just not unreasonable. This approach we reject. When, in a particular case, the risk qualitatively (e.g., of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as to call

> for a true choice judgment, medical or professional, the warning must be given.

399 F.2d at 129-130.

So it is with the case at bar. The utility of an insulation product containing asbestos may outweigh the known or foreseeable risk to the insulation workers and thus justify its marketing. The product could still be unreasonably dangerous, however, if unaccompanied by adequate warnings. An insulation worker, no less than any other product user, has a right to decide whether to expose himself to the risk.

Furthermore, in cases such as the instant case, the manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product. *Wright* v. *Carter Products, Inc.*, 2 Cir. 1957, 244 F.2d 53. The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.[24] But even more importantly, a manufacturer has a duty to test and inspect his product.[25] The extent of research and experiment must be commensurate with the dangers involved. A product must not be made available to the public without disclosure of those dangers

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[24] *See* Keeton, Products Liability — Problems Pertaining to Proof of Negligence, 19 S.W.L.J. 26, 30-33 (1965).

[25] *See* 1 Frumer & Friedman, Products Liability, § 6.01 [1] and cases cited; Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 Yale L. J. 816, 853 (1962). *See also* Roginsky v. Richardson-Merrell, Inc., 2 Cir. 1967, 378 F.2d 832; Tinnerholm v. Parke-Davis & Co., S.D.N.Y. 1968, 285 F. Supp. 432, *aff'd*, 411 F.2d 48; Schnenbeck v. Sterling Drug, Inc., D.D. Ark. 1968, 291 F. Supp. 368.

that the application of reasonable foresight would reveal. Nor may a manufacturer rely unquestioningly on others to sound the hue and cry concerning a danger in its product. Rather, each manufacturer must bear the burden of showing that its own conduct was proportionate to the scope of its duty.

We now turn to the charge in the present case and the defendants objections to it. The trial judge instructed the jury in terms of both breach of warranty and strict liability in tort. He stated that strict liability could be imposed only if the product was unreasonably dangerous to the user or consumer at the time it was sold. He defined "unreasonably dangerous as dangerous to an extent "beyond that contemplated by [an] insulation contractor or insulator [i.e. asbestos insulation worker] with knowledge available to them as to the characteristics of the product". Furthermore, the court stated that the danger "must have been reasonably foreseen by the manufacturer" and that the product's unreasonably dangerous condition must have been the proximate cause of Borel's injury.[26]

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[26] The trial court stated, in part:

> Now, turning our attention to the matter of the defenses of the defendants in connection with the implied warranty or strict liability, you are charged that if there is any unreasonable risk or danger from using defendants' products containing asbestos, which risk or danger must be the risk or danger beyond that which would be contemplated by insulation contractor or insulator with the knowledge available to them as to characteristics of the product, such unreasonable risk or danger from using defendants' product must have been reasonably foreseen by the manufacturer. Therefore, if you find from a preponderance of the evidence that Mr. Borel came in contact with the defendants' product and developed asbestosis thereafter and at such time of contact the product containing asbestos manufactured by the defendant and that the danger of the use of the said asbestos seen by the manufacturer, then there could be no proximate products by Mr. Borel could not have been reasonably fore-

The defendants first object to the court's use of breach of warranty language in some parts of the charge. It is argued that such terms as "unmerchantable", and "unfit for ordinary purposes" may have led the jury to believe that liability could be imposed simply because the product caused harm in its ordinary and intended use.

Although we agree that a reference to "breach of warranty" in a product liability charge may be unnecessarily confusing in some cases, since that is the language of contracts not torts, we are persuaded that no prejudice resulted to the defendants from its use in this case. Consistent with *Shamrock Fuel & Oil Sales* v. *Tanks*, the trial court accurately instructed the jury on strict liability in torts as defined in section 402 A of the *Restatement*. With

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cause and your verdict would be for the defendants. In other words, there would be no proximate cause of the breach of the warranty or strict liability that would justify your finding in favor of the plaintiff, but you would have to find for the defendants. Also, in connection with the implied warranty theory, you are instructed that the burden of proof is on the plaintiff in this case. Before they are entitled to recover any damages against any of the defendants to establish by a preponderance of the evidence that the product sold by the particular defendant or defendants was defective at the time it was sold. Before a product can be found to be defective it must establish that it was unreasonably dangerous to the user of consumer at the time it was sold. You are further instructed that the burden of proof is on the plaintiff to establish also by a preponderance of the evidence not only that the product was defective but also that the defect in the product was a proximate cause of the death of Clarence Borel.

By the term DEFECTIVE as used in this charge is meant a condition not contemplated by the insulator, contractor or ultimate user. Accordingly, you are instructed that in the event plaintiff has failed to prove by a preponderance of the evidence the existence of a defect in the product at which time the product was sold and that such defect was the proximate cause of the death of Clarence Borel, then you cannot find for the plaintiff on the theory of breach of implied warranty or strict liability and you must return a verdict against the plaintiff and in favor of the defendants.

respect to breach of implied warranty, the court specifically equated "unfitness" or "unmerchantability" with the "unreasonably dangerous" standard of strict liability in tort.[27] Viewing the charge as a whole, we think that the jury fully understood that liability could be imposed only if the product was unreasonably dangerous.

The defendants also contend that the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved. The trial court, however, did tell the jury that liability could not be imposed unless the product was "unreasonably dangerous," a concept that necessarily implies a balancing of a product's utility against the danger. Furthermore, as we noted earlier, even when such a balancing leads to the conclusion that marketing is justified, the seller still has a responsibility to inform the user or consumer of the risk. The failure to give adequate warnings in such circumstances can render the product unreasonably dangerous. See Restatement (Second) of Torts, § 402A, comment k; *Davis* v. *Wyeth Laboratories, Inc.* That was precisely the contention of the plaintiff in this case. We therefore find no error.

The defendants next contend that it was error for the trial court to imply that the defendants had an independent duty to test their product. As we have made clear, however, the manufacturer's duty to test his product is well-established.[28]

Finally, the defendants contend that the district court erred in refusing to instruct the jury that a product can-

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[27] Breach of warranty cases invariably speak in terms of fitness for the particular purposes for which the products were sold. This formulation parallels the "unreasonably dangerous" rule applied in strict liability in tort cases. *See* Lartigue v. R. J. Reynolds Tobacco Co., 5 Cir. 1963, 317 F.2d 19, 37; Greenman v. Yuba Power Prods., Inc., Cal. Sup. Ct. 1963, 377 P.2d 897.

[28] *See* footnote 25.

not be unreasonably dangerous if it conforms to the reasonable expectations of the industrial purchasers, here, the insulation contractors. The defendants assert, in effect, that it is the responsibility of the insulation contractors, not the manufacturers, to warn insulation workers of the risk of harm. We reject this argument. We agree with the *Restatement*: a seller may be liable to the *ultimate* consumer or user for failure to give adequate warnings. The seller's warning must be reasonably calculated to reach such persons and the presence of an intermediate party will not by itself relieve the seller of this duty. *Sterling Drug Co.* v. *Cornish*, 8 Cir. 1966, 370 F.2d 82; *Yarrow* v. *Sterling Drug*, 8 Cir. 1969, 408 F.2d 978; Noel, Products Defective Because of Inadequate Directions or Warnings, 23 S.W.L.J. (1969). In general, of course, a manufacturer is not liable for miscarriages in the communication process that are not attributable to his failure to warn or the adequacy of the warning. This may occur, for example, where some intermediate party is notified of the danger, or discovers it for himself, and proceeds deliberately to ignore it and to pass on the product without a warning.[29] But there is nothing in the trial court's charge in the present case to imply that the seller or manufacturer would be liable in such a situation. To the contrary, the trial court fully instructed the jury that the defect rendering the product unreasonably dangerous must be the proximate cause of the plaintiff's injury.

We conclude, therefore, that the trial court did not err in instructing the jury on strict liability.

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[29] *See* Prosser, The Fall of the Citadel, (strict Liability to the Consumer), 50 Minn. L. Rev. 791, 826-828 (1966). Where a product is extremely dangerous, however, the seller or manufacturer cannot rely upon the intermediate party to transmit a warning. *See Prosser, id.*; Noel, Products Defective Because of Inadequate Directions or Warnings, 23 S.W.L.J. 256 (1969).

III.

We now turn to the question whether the trial court erred in denying the defendants' motions for a directed verdict and for judgment notwithstanding the verdict. In diversity cases, a federal rather than a state test is applied to determine whether there was sufficient evidence to create a jury question. *Planters Manufacturing Co.* v. *Protection Mut. Ins. Co.*, 5 Cir. 1967, 380 F.2d 869; *Helene Curtis Industries, Inc.* v. *Pruitt*, 5 Cir. 1967, 385 F.2d 841. In *Boeing Co.* v. *Shipman*, 5 Cir. 1969, 411 F.2d 365, 374, we defined the test as follows:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just the evidence that supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury.

An appellate court, of course, must scrupulously avoid usurping the function of the jury by weighing conflicting evidence and inferences or by judging the credibility of witnesses and then arriving at its own conclusion concerning the merits of the parties' contentions. Rather, our task is limited to determining whether there is a conflict in substantial evidence sufficient to create a jury question.

A. First, we approach the question whether the danger to Borel and other insulation workers was foreseeable at

the time the products causing Borel's injury were sold. The defendants' position is that they did not breach their duty to warn because the danger from inhaling asbestos was not foreseeable until about 1968 and that, in view of the long latent period of the disease, Borel must have contracted asbestosis well before that date.

To begin, we note that the disease of asbestosis is cumulative. Thus, both Borel's earliest exposure to asbestos dust, occurring in the late 1930's and his most recent exposure, occurring in 1968, could have contributed to his overall condition. The defendants' failure to warn of the dangers of the exposures occurring in 1968 may have resulted in an actionable injury to Borel. But even if it is assumed that Borel's condition was attributable principally to his earlier exposures, the defendants argument still fails since there is ample evidence in the record that the danger of inhaling asbestos, including the disease of asbestosis, was widely recognized at least as early as the 1930's. An expert witness, Dr. Hans Weill, testified that prior to 1935 there were literally "dozens and dozens" of articles on asbestos and its effect on man. Dr. Clark Cooper, an expert witness for the defendants, stated that it was known in the 1930's that inhaling asbestos dust caused asbestosis and that the danger could be controlled by maintaining a modest level of exposure. Dr. Cooper testified as follows:

"Q. The state of knowledge in the 1930's, let's say, in your opinion was asbestosis as a disease known about and recognized as a danger caused by inhaling asbestos dust?

"A. Yes.

"Q. And would you say that would have been rather common knowledge known in the 1930's?

"A. Yes, I would say that. The answer to that would be yes."

As stated in our recital of the facts, several studies published during the 1930's and 1940's reported the danger to asbestos plant workers and others exposed to asbestos dust and urged precautionary measures to eliminate hazardous concentrations. The American Conference of Governmental Industrial Hygienists, beginning in 1947, issued guidelines suggesting threshold limit values for exposure to asbestos dust. Even the Fleischer-Drinker report in 1945, relied on by the defendants, cautioned that exposure to high concentrations of asbestos dust could cause asbestosis and recommended the use of ventilation and respiratory protection devices.

The evidence also tended to establish that none of the defendants ever tested its product to determine its effect on industrial insulation workers. Nor did any defendant ever attempt to determine whether the exposure of insulation workers or others to asbestos dust exceeded the A.C.G.I.H.'s recommended threshold limit values, or indeed, whether those standards were accurate or reliable.

As previously mentioned, the foreseeability of the danger must be measured in light of the manufacturer's status as an expert and the manufacturer's duty to test its product. In these circumstances, we think the jury was entitled to find that the danger to Borel and other insulation workers from inhaling asbestos dust was foreseeable to the defendants at the time the products causing Borel's injuries were sold.

The defendants next challenge the jury's finding that their products were unreasonably dangerous for failure to give warnings. They cannot deny, however, that once the danger became foreseeable, the duty to warn attached. *Davis* v. *Wyeth Laboratories, Inc.* Here, the defendants gave no warning at all. They attempt to circumvent this

finding by arguing, disingenuously, that the danger was obvious. For present purposes, it is sufficient to note that Borel testified that he did not know that inhaling asbestos dust could cause serious illness until his doctors advised him in 1969 that he had asbestosis. Furthermore, we cannot say that, as a matter of law, the danger was sufficiently obvious to asbestos installation workers to relieve the defendants of the duty to warn.

The jury found that the unreasonably dangerous condition of the defendants' product was the proximate cause of Borel's injury. This necessarily included a finding that, had adequate warnings been provided, Borel would have chosen to avoid the danger. *Davis* v. *Wyeth Laboratories, Inc.*; *Charles Pfizer & Co.* v. *Branch*, Tex. Civ. App. 1963, 365 S.W.2d 832.

B. Two defendants, Pittsburgh and Armstrong, argue that, as to them, the jury's finding of strict liability cannot stand because it is inconsistent with the jury's finding in a separate general verdict that they were not negligent. As previously discussed, when a failure to give adequate warning is alleged to have made a product unreasonably dangerous, the standard for strict liability is essentially similar to the standard for establishing negligence: the seller or manufacturer has a duty to warn of foreseeable dangers. In the present case, the plaintiff sought to recover on the basis of both negligence and strict liability in warranty and tort. The trial court submitted the case to the jury in the form of two general verdicts accompanied by a special interrogatory on contributory negligence. On the negligence count, the jury found that Pittsburgh and Armstrong were not negligent in failing to warn of a foreseeable danger, and on the strict liability count, that their products were unreasonably dangerous because of the failure to warn of the same danger.

This inconsistency in the jury's verdicts, although puzzling, need not detain us. It has long been the rule that consistency in general verdicts is not required. *Dunn* v. *United States*, 1932, 284 U.S. 391, 52 S.Ct. 189, 76 L.Ed. 359. "Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty . . . is immaterial. Juries may indulge in precisely such motives or vagaries." *United States* v. *Dotterweich*, 1943, 320 U.S. 277, 279, 64 S.Ct. 134, 88 L.Ed. 48. Thus, even if the general verdicts are internally inconsistent, such is the jury's prerogative if, as we have found, there is evidence to support the finding reached by the jury.

C. We next consider whether there was substantial evidence to support the jury's finding that each defendant was the cause in fact of injury to Borel. The traditional rule is that a defendant's conduct is the cause of the event if it was a substantial factor in bringing it about. Prosser, Law of Torts § 41 at 240 (3ed 1971); Second Restatement of Torts, §§ 431, 433 Malone, Ruminations on Cause-in-Fact 9 Stan. L. Rev. 60 (1956); Green, The Causal Relation Issue, 60 Mich. L. Rev. 543 (1962). Whether the defendant's conduct was a substantial factor is a question for the jury, unless the court determines that reasonable men could not differ.

In the instant case, it is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury to Borel. It is undisputed, however, that Borel contracted asbestosis from inhaling asbestos dust and that he was exposed to the products of all the defendants on many occasions. It was also established that the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury. We think, therefore, that

on the basis of strong circumstantial evidence the jury could find that each defendant was the cause in fact of some injury to Borel.

Relying on expert testimony that asbestosis does not usually manifest itself until fifteen, twenty, or even twenty-five years after initial exposure, Pittsburgh Corning Company and Armstrong Cork Company contend that they cannot be liable because Borel was not exposed to their products until after 1962 and 1966 respectively. As we have pointed out, however, the length of this latent period varies acording to individual idiosyncracy, duration and intensity of exposure, and the type of asbestos used; in some cases the effect of the exposure may manifest itself in less than five or ten years. Thus, even the most recent exposures could have added to or accelerated Borel's overall condition.

IV.

Having concluded that each defendant was the cause in fact of some injury to Borel, we now come to the question of apportionment of damages. In general, a defendant is liable only for that portion of the harm which he in fact caused. A problem arises, however, where, as here, several causes combine to produce an injury that is not reasonably capable of being divided. In the instant case, the trial court resolved this issue by holding the defendants jointly and severally liable for the entire harm. Asserting error, the defendants argue that if the injury cannot be reasonably apportioned, the plaintiff must bear the entire loss unless it can be shown that the tortfeasors acted in concert or with unity of design.

The defendants' argument is best illustrated by *Sun Oil* v. *Robicheaux,* Tex. Civ. App. 1930, 23 S.W.2d 713, a case in which several defendants, acting independently, were polluting a bayou from which the plaintiff was taking water

for irrigation. The court held that an action at law for damages could not be maintained jointly against the defendants and that each was liable only for the part of the injury which he caused. The court stated:

> Under such circumstances each tort-feasor is liable only for the part of the injury or damages caused by his own wrong; that is, where a person contributes to an injury along with others, he must respond in damages, but if he acts independently, and not in concert of action with other persons in causing such injury, he is liable only for the damages which directly and proximately result from his own act, and the fact that it may be difficult to define the damages caused by the wrongful act of each person who independently contributed to the final result does not affect the rule.

23 S.W.2d at 715.

The effect of the *Robicheaux* rule was to make it impossible to join several wrongdoers whose independent acts caused an injury which, although theoretically divisible, was indivisible as a practical matter. The burden was placed on the plaintiff to prove with reasonable certainty what portion of the total damage was attributable to each defendant. Failing that, recovery would be denied even though it was undisputed that each defendant caused some harm.

In 1952, the *Robicheaux* case was expressly overruled by the Texas Supreme Court in *Landers* v. *East Texas Salt Water Disposal Co.*, 248 S.W.2d 731.[39] In that case, an oil company and a salt water disposal company each owned pipe lines running near the plaintiff's land. At about the same time, each pipe line broke, pouring oil and saltwater onto the plaintiff's land and into his lake. The plaintiff

[39] *See* Note, 31 N.C. L. Rev. 237 (1953); 31 Texas L. Rev. 226 (1953).

sought to hold the defendants liable for the entire harm. In upholding the joinder of the two defendants, the court noted that prior cases "seem to have embraced the philosophy . . . that it is better that the injured party lose all of his damages than that any of the several wrongdoers pay more of the damages than he individually and separately caused. If such has been the law, than from the standpoint of justice it should not have been; if it is now, it will not be hereafter". 248 S.W.2d at 734. The court then announced the new rule:

> Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit. *Id.*

The effect of the *Landers* case may be stated as follows: Where several defendants are shown to have each caused some harm, the burden of proof (or burden of going forward) shifts to each defendant to show what portion of the harm he caused. If the defendants are unable to show any reasonable basis for division, they are jointly and severally liable for the total damages.[31]

The defendants attempt to distinguish *Landers* by asserting that it applies only to situations where the tortious acts occur simultaneously. As the court noted in *Landers*, however, there was no allegation in the plaintiff's complaint that the defendants tortious acts occurred at the same time. The court specifically refused to limit its hold-

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[31] *See* Prosser, Law of Torts, § 52 at 319-320 (4ed 1971). Professor Wigmore suggested a similar rule long ago. *See* Wigmore, 17 Ill. L. Rev. 458 (1923).

ing to cases in which "the negligence of the wrongdoers contributing to the injury was operating simultaneously". 248 S.W.2d at 735. Later Texas cases have also applied the Landers rule to non-simultaneous tortious acts.[32] See *Continental Elec. Mfg. Co.* v. *Navajo Freight Lines, Inc.*, 5 Cir. 1971, 447 F.2d 1174.

Applying these principles to the present case, we conclude that the defendants may be held jointly and severally liable for the total damages.

V.

We now turn to a consideration of the defensive issues raised in the trial court's charge. The principal issue on appeal is whether the trial court properly instructed the jury as to which forms of contributory negligence or assumption of risk are defenses to a strict liability action. The defendants contend that the plaintiff's recovery should have been barred by both the doctrine of *volenti non fit injuria* and contributory negligence. In brief, it is argued that Borel assumed the risk when he continued in his employment as an insulator after he knew and appreciated the danger from the defendants' product.[33]

Volenti non fit injuria, an ancient maxim meaning that no wrong is done to one who consents, is essentially a form of

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[32] *See, e.g.*, Riley v. Industrial Finance Service, 1957, 302 S.W.2d 306; Kirby Lumber Corp. v. Walters, Tex. Civ. App. 1955, 277 S.W.2d 796.

[33] For a discussion of this topic, *see* Noel, Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93 (1972); Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267; Keeton, Assumption of Products Risk, 19 S.W.L.J. 61 (1965); Greenhill, Assumption of Risk, 16 Baylor L. Rev. 111 (1964); Keeton, Assumption of Risk and the Landowner, 22 La. L. Rev. 108 (1961); Keeton, Assumption of Risk in Products Liability Cases, 22 La. L. Rev. 122 (1961).

assumption of risk. Under Texas law, the *volenti* doctrine has four elements: (1) the plaintiff knows the facts constituting a dangerous condition; (2) he knows the condition or activity to be dangerous; (3) he appreciates the nature or extent of the danger; and (4) he voluntarily exposes himself to the danger. *Halepeska* v. *Callihan Interests, Inc.*, Tex. Sup. 1963, 371 S.W.2d 368. Texas courts have held that *volenti* is a subjective standard: the plaintiff must know, understand, and appreciate the danger, and consent to expose himself to it. *J. & W. Corp., Inc.* v. *Ball*, Tex. Sup. Ct. 1967, 414 S.W.2d 143.

In its most traditional form, contributory negligence consists of the plaintiff's failure to exercise the care of a reasonable person for his own protection. It may overlap with *volenti* in situations where the plaintiff has been contributorily negligent in proceeding to encounter an unreasonable risk. This form of contributory negligence differs from *volenti* in two respects. First, contributory negligence is an objective rather than a subjective standard. The plaintiff is required to have the knowledge, understanding, and judgment of an ordinary reasonable man and must exercise due care to discover and understand the defect or danger. Second, justification, in terms of the reasonableness of the plaintiff's conduct, is an important element. The plaintiff is not contributory neglient unless his conduct in encountering the danger was unreasonable. Thus, unlike *volenti*, the contributory negligence doctrine requires a balancing of the utility of the plaintiff's conduct against the magnitude of the danger. *See generally*, (Second) Restatement of Torts §§ 463, 466 (1964); Restatement (Second) of Torts, §§ 496A-G (Tent. Draft No. 9, 1963).

Another form of contributory negligence consists of voluntary and unreasonable conduct in encountering a known

risk. As found in comment n to section 402A of the *Restatement*,[34] it represents a hybridization of *volenti* and traditional contributory negligence. Applying a subjective standard, the jury must find the first three elements of *volenti:* the plaintiff must have had actual knowledge, understanding, and appreciation of the danger. With respect to voluntariness, however, the jury must find that the plaintiff's action was both voluntary from a subjective standpoint and unreasonable from an objective standpoint.

The applicability of a *volenti* or contributory negligence defense to a strict liability action is unclear under Texas law. The leading Texas decision concerning the strict liability action is *Shamrock Fuel & Oil Sales* v. *Tunks*, Tex. Sup. Ct. 1967, 416 S.W.2d 779. In that case, the plaintiff sought damages for injuries sustained while using adulterated kerosene. The defendants asserted that recovery should be denied because of the plaintiff's contributory negligence in failing to discover the dangerous nature of the adulterated kerosene or to guard against the possibility of its existence. Following in part the position taken in comment n to section 402A of the Restatement,[35] the Texas

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[34] Section 402A of the Second Restatement of Torts states, in part:

> n. *Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

[35] The Court also quoted Dean Prosser with approval:

> "There has been ostensible, and quite superficial, dis-

Supreme Court held that such negligence was not a defense to a strict liability action.

Later Texas decisions have re-affirmed the holding in *Shamrock* but have left unanswered what other forms of contributory negligence, assumption of risk, or *volenti* are a defense to a strict liability action. *See McKisson* v. *Sales Affiliates, Inc.* Our *Erie* ruminations in *Messick* v. *General Motors Corp.*, 5 Cir. 1972, 460 F.2d 485, however, have led us to predict that Texas will adopt the position taken in comment n to section 402A of the *Restatement* that contributory negligence or assumption of risk is a defense to a strict liability action only when it consists of a voluntary and unreasonable conduct to encounter a known risk. In *Messick*, the plaintiff continued to drive his new car even after a private mechanic told him that its defective steering and suspension systems would cause his death. When the car later ran off the road, the plaintiff sued the manufacturer to recover damages for personal injuries sustained

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agreement over whether contributory negligence is available as a defense where the action is one for breach of warranty. A few decisions have said flatly that it is not. The greater number have said quite as flatly that it is. The conflict is, however, more apparent than real. If the cases are examined, it readily appears that those which refuse to allow the defense have been cases in which the plaintiff negligently failed to discover the defect in the product, or to guard against the possibility of its existence. They are entirely consistent with the general rule that such negligence is not a defense to an action founded upon strict liability. Those which have permitted the defense all have been cases in which the plaintiff has discovered the defect and the danger, and has proceeded nevertheless to make use of the product. They represent the form of contributory negligence which consists of deliberately and unreasonably proceeding to encounter a known danger, and overlaps assumption of risk. They are quite consistent with the general rule that this is a defense to strict liability. There are only a few cases which have recognized the distinction; but it seems quite clear that it is made in fact." (Prosser, Law of Torts [3ed] 656).

416 S.W.2d at 783.

in the accident. The plaintiff alleged that the defendant was strictly liable because the car's defects rendered it unreasonably dangerous. After the jury returned a verdict in the plaintiff's favor, the defendant appealed, arguing that *volenti* was established as a matter of law by the plaintiff's voluntary decision to continue using the car. In affirming, this Court held that continued use of a product known to be defective is a defense to a strict liability action only when the continued use is unreasonable. The court stated: "The limits of a manufacturer's liability for releasing a defective and unreasonably dangerous product in the *volenti* area are that the plaintiff's consent to incur the risk has been voluntarily given and is objectively unreasonable. The plaintiff at bar was entitled to go to the jury with the question of whether his consent was voluntary or was the product of duress of circumstances and unreasonable." 460 F.2d at 494.

We now turn to the trial court's instructions in the present case. The trial court, informing the jury that assumption of risk was a defense to a strict liability action, stated as follows:

> [T]he defendants contend that the deceased, Mr. Borel, knew of the dangerous nature of the asbestos product manufactured by the defendants in connection with his insulation work and appreciated the danger and with such knowledge voluntarily assumed the risk by continuing his employment. Further, that this knowledge of the danger of the insulation was known to Mr. Borel's contractor or employer. Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the deceased knew of the dangerous nature of the asbestos products with which he was working and appreciated the danger of working with such products or that he had knowledge through his contractor of the dangerous nature of the

> **product and that he assumed the risk by continuing his work, then you would find against the plaintiff and in favor of the defendants.**

In effect, the trial court instructed the jury that *volenti*, consisting of voluntary conduct in encountering a known and appreciated danger, is a defense to a strict liability action. This was error since, as we have held, contributory negligence or assumption of risk is a defense to a strict liability action only if the plaintiff's conduct is both voluntary *and* unreasonable. *Messick* v. *General Motors Corp., supra;* Restatement (Second) of Torts, § 402A, comment (n); Prosser, Law of Torts, § 102. The trial court's charge was overly favorable to the defendants. Despite this error, the jury still found that Borel had not assumed the risk even under the harsh *volenti* doctrine. Reversal of the jury's verdict, therefore, is not required.

The defendants contend, however, that they are entitled to judgment as a matter of law even if the *Restatement* standard had been correctly applied. We disagree. There is strong evidence in the record that Borel never actually knew or appreciated the extent of the danger involved. Borel testified that he never realized that inhaling asbestos dust could cause serious illness until his doctors first diagnosed his condition as asbestosis in 1969. Nor can we say that the danger was so obvious that Borel should be charged with knowledge as a matter of law. *Halepeska* v. *Callihan Interests, Inc., supra; Schiller* v. *Rice*, Tex. Sup. 1952, 246 S.W.2d 607. Furthermore, there was evidence that Borel's decision to continue in his employment was neither voluntary nor unreasonable. *Messick* v. *General Motors Corp., supra.* In these circumstances, we find no cause to invade the province of the jury.

We next consider whether the trial court erred in instructing the jury that none of the alleged acts of con-

tributory negligence was a defense to a strict liability action. The court described the acts of contributory negligence as follows:

> In this connection, the defendants contend that the deceased was negligent in failing to use a mask and respirator for protection from dust containing some asbestos; in failing to request his employer to furnish blowers to remove dust laden air; in working in asbestos dust laden air with full knowledge that he was inhaling such dust laden air; in continuing to work with insulation material containing some asbestos after he knew or in the exercise of ordinary care should have known that it was affecting his health.

The defendants assert that Borel's allegedly negligent failure to wear a respirator constituted a misuse of the product that bars recovery.

"Misuse" involves a use of the product in a manner not reasonably foreseen by the seller or manufacturer.[36] The most common form of misuse is a failure to follow adequate directions or warnings accompanying the product. In *Procter & Gamble Manufacturing Co.* v. *Langley*, Tex. Civ. App. 1967, 422 S.W.2d 773, for example, the plaintiff read and understood the instructions accompanying a home permanent hair wave product but nevertheless failed to follow them in several important respects. When injury resulted, the plaintiff sued the manufacturer, the wholesale distributor, and the retail seller for breach of implied warranty. The court held that the plaintiff's violation of the plain instructions and warnings was a misuse of the product and constituted a defense to her cause of action. On rehearing, the court stated:

> We do not believe that the strict liability doctrine means [that] . . . a consumer may knowingly violate

[36] *See* Noel, note 32 *supra*.

> the plain, unambiguous instructions and ignore the warnings, then hold the makers, distributors and sellers of a product liable in the face of the obvious misuse of the product. Appellees brought their suit on the theory of implied warranty. We agree that the product carried an implied warranty of fitness, but such warranty existed only if the product was used in accordance with directions. The implied warranty did not apply when the product was misused, as it undisputedly was in this case. 422 S.W.2d at 780.

Similarly, in *McDevitt* v. *Standard Oil Co. of Texas*, 1968, 391 F.2d 364, the plaintiff sued an automobile tire retailer to recover damages for injuries sustained when his automobile tires failed and the car left the road. There was evidence that the plaintiff was provided with manufacturer's instructions regarding proper tire size but that he purchased an improper size. In addition, the record indicated that the vehicle was driven with air pressure in the tires at times well above, and at times well below, the recommended pressure as set out in the published manuals. There was also evidence that the vehicle was driven at excessive speeds and over rough terrain. The court, construing Texas law, held that the plaintiff's actions constituted a misuse of the product and was a defense to a strict liability action.

In the case at bar, we are not confronted with a failure to follow adequate instructions or warnings. Indeed, the evidence tended to establish that the defendants gave no instructions or warnings at all. They never suggested that respirators should be worn by insulation workers or provided any other directions as to the product's use. Nor are we confronted with any other type of conduct that was not reasonably foreseeable by the defendant manufacturers. From all that appears, Borel used the defendants' product exactly for its intended purpose. Rather, the defendants

allege merely that Borel was contributorily negligent in failing to use a respirator. This form of contributory negligence amounts to a failure to discover a defect in the product or to guard against the possibility of its existence and is not a defense to a strict liability action. *Shamrock Fuel & Oil Sales* v. *Tunks*, *McKisson* v. *Sales Affiliates, Inc.* We therefore find no error in the trial court's charge.

The defendants also assert that the trial court's instructions to the jury were confusing and ambiguous in some parts. The trial court's charge must be read as a whole and not as if each sentence were a solitary verbal phenomenon existing in an otherwise empty vacuum. The test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues. *Gearhart* v. *WSAZ, Inc.*, 1957 E.D.Ky., 150 F. Supp. 98, aff'd 254 F.2d 242; *Miller* v. *Pacific Mut. Life Ins. Co.*, D.C. Mich 1955, 17 F.R.D. 121, aff'd 228 F.2d 889. On reading the trial court's charge in this case, we find that it meets that standard

The defendants further complain because the trial court refused to submit special interrogatories to the jury on several issues, including assumption of risk, but instead submitted the case on a general verdict. Rule 49 of the Federal Rules of Civil Procedure, however, gives the trial court wide discretion in determining the wording and form of verdicts. In the present case, we cannot say that the trial court abused its discretion. *See Car* v. *General Ins. Corp.*, 5 Cir. 1947, 159F.2d 985; *De Eugenio* v. *Allis-Chalmers Mfg. Co.*, 3 Cir. 1954, 210 F.2d 409; *Texas & P. Ry. Co.* v. *Friffen*, 5 Cir. 1959, 265 F.2d 489.

VI.

We are next met with the contention that Borel's action is barred by the statute of limitations. The record shows that Borel filed a claim under the Texas Workmen's Compensation Act,[37] Tex. Civ. Stat. art. 8307 *et seq.*, on January 17, 1969. After the Industrial Accident Board approved a settlement award on July 31, 1969, Borel filed the present damage action on October 20, 1969. Under Texas law, an action for personal injuries must be commenced and prosecuted within two years after the cause of action accrued. Tex. Civ. Stat. art. 5526. The defendants' position is that a cause of action accrues at the time of the injury and that the only effect of filing a claim under the Workmen's Compensation Act is to toll the statute of limitations until the Board issues a final order approving the award. The plaintiff, on the other hand, contends that when an injured employee successfully pursues his remedy for compensation under the Act, the statute of limitations for his damage action against a third party (that is, a party other than

[37] The Texas Workmen's Compensation Act operates in the following manner. Where a party other than the employer is legally liable for an injury compensable under the Texas Workmen's Compensation Act, the employee has the option of either proceeding at common law against that third party to recover damages or under the Act against the employer's insurance carrier, the Texas Employers' Insurance Association. If he elects first to pursue his remedy at common law against the third party, the employee is not entitled to any compensation under the Act and must bring his suit within two years after the cause of action accrues. If he elects to pursue his remedy under the Act, the employee must file a claim for compensation with the Industrial Accident Board within six months after the occurrence of the injury or the first manifestation of an occupational disease. If good cause is shown, however, the Board may waive strict compliance with the six month requirement. After the Board has issued a final order, the employee may then pursue his remedy at common law against the third party. Texas Civ. Stat. art. 8307, sec. 4a, 6a.

his employer) does not begin to run until the Board issues its final order.

The Texas Supreme Court considered this issue in *Campbell v. Sonford Chemical Co.*, 1972, 486 S.W.2d 932. In that case, the employee, Campbell, filed a damage action on May 15, 1969, against a third party, Sonford, for personal injuries sustained in the fall and winter of 1964 and the spring of 1965. The compensation carrier for Campbell's employer intervened in order to exercise its subrogation rights under the Act for amounts previously paid to Campbell. Sonford moved for summary judgment on the ground that the action was barred by the two year statute of limitations since the injuries occurred in 1964 and Campbell had not filed his claim with the Industrial Accident Board until September 8, 1967. In his answer, Campbell asserted that the action was timely because it was filed about a week after the Board's final order on May 7, 1969. The trial court granted Sonford's motion to dismiss the action.

In reversing the trial court's decision, the Texas Supreme Court held that the statute of limitations "runs against the carrier of the employee in third-party actions authorized by section 6a [of the Workmen's Compensation Act] from the date of the payment of the award of the Industrial Accident Board or the entry of final judgment against the carrier".[38] The Court stated the Texas rule as follows:

> When a claimant elects to proceed under workmen's compensation statutes and qualifies for an award there-

[38] An employee is still subject to the requirement that claims be filed with the Board within six months after the occurrence of the injury or the first manifestation of an occupational disease, Texas Civ. Stat. art. 8307, sec. 4a. In *Campbell*, the Board excused the plaintiff from strict compliance with the six month rule after good cause was shown for the delay. In the present case, the record does not indicate whether this issue was raised before the Board.

> under, the cause of action does not accrue against a third party until the amount of the award made by the Industrial Accident Board is paid by the carrier or until the claimant obtains a final judgment in a court of competent jurisdiction against the carrier. When either of these events occur, the cause of action matures against the third party and the suit authorized by section 6a must be filed on such cause of action either by the carrier or by the insured within two years from that date.

Other Texas cases support this interpretation. See *Mourning* v. *Crown Stevedoring Co.*, Tex. Civ. App. 1967, 417 S.W.2d 725 (writ ref'd n.r.e.); *Judice* v. *Sumner Sollitt Co. of Texas*, Tex. Civ. App. 1961, 346 S.W.2d 135 (writ ref'd n.r.e.); *Thompson* v. *Graham*, Tex. Civ. *Brooks* v. *Lucky*, Tex. Civ. App. 1957, 308 S.W.2d 273 App. 1958, 318 S.W.2d 102 (writ ref'd n.r.e.); *Brooks* v. *Lucky*, Tex. Civ. App. 1957, 308 S.W.2d 273 (writ ref'd n.r.e.); *Texas Employers' Ins. Ass'n* v. *Texas & P. Ry. Co.*, Tex. Civ. App. 1939, 129 S.W.2d 746 (writ dism'd jdgmt cor.); *Fidelity Union Casualty Co.* v. *Texas P. & L. Co.*, Tex. Civ. App. 1931, 35 S.W.2d 782 (writ ref'd).

In the case at bar, the Board issued its final judgment approving the settlement award on July 31, 1969, and the plaintiff filed his damage action a few months later, on October 20. Under the *Campbell* case, therefore, this action is not barred by the statute of limitations.

Even if it is assumed that the defendants are correct in contending that the Workmen's Compensation Act merely tolls the statute of limitations, the present action is still not barred. The defendants assert that a cause of action accrues at the time of the injury and that Borel, having been exposed to asbestos dust since 1936, must have contracted asbestosis long before 1969, the date this action

was filed. Alternatively, it is argued that each injurious exposure was a separate tort, resulting in the accrual of a new cause of action, and that Borel cannot recover for any exposure to asbestos dust occurring before 1967.

In *Urie* v. *Thompson*, 1949, 337 U.S. 170, 69 S.Ct. 170, 93 L.Ed. 1282, the Supreme Court considered a similar question involving a locomotive fireman who had contracted silicosis. The defendant urged that the action was barred by the three year statute of limitations imposed by the Federal Employers' Liability Act. Rejecting this interpretation, the Court held that the cause of action did not accrue until the plaintiff either knew or had reason to know of the disease. The Court stated:

> [Any other rule] would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, [the plaintiff] Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability. 92 L.Ed. at 1292.

In cases involving similar injuries resulting from exposures to deleterious substances over a period of time, courts have consistently held that the cause of action does not accrue until the effects of such exposures manifest themselves. *Associated Indemnity Corp.* v. *Industrial Accident Commission*, Cal. S.Ct. 1932, 12 P.2d 1075; *United States* v. *Reid*, 5 Cir. 1958, 251 F.2d 691. This principal is analogous to the "discovery rule" applied in medical malpractice cases, which provides that the cause of action does not accrue until the injury is discovered or in the exercise of reasonable diligence should have been discovered. *See Gad-*

dis v. *Smith*, Tex.S.Ct. 1967, 417 S.W.2d 577 (citing *Urie* v. *Thompson* with approval). Texas courts have applied this rule in many other contexts.[39]

Here, Borel testified in his deposition that he did not know that he had asbestosis until surgery was performed on March 7, 1969. No doctor previously examining Borel had diagnosed his condition as asbestosis. Borel filed his action seven months after he was informed of his condition. The trial court determined that the action was filed timely and refused to submit the issue to the jury. Since there is no substantial evidence opposing the court's findings, we conclude that it did not err on this point.

VII.

The trial court determined that the total amount of damages was $79,436.24. Since four of the ten defendants named in the original complaint had settled before trial, paying a total of $20,902.20, the trial court rendered judgment jointly and severally against the remaining six defendants for the balance of $58,534.04. The defendants now argue that the trial court should have given each defendant named in the original complaint a prorata credit of four-tenths of the total amount of damages leaving a balance of $46,669.98 to be rendered against the remaining six defendants. The full credit method used by the trial court, however, was one of the methods of computing damages initially suggested by the defendants. Furthermore, the defendants have failed to show how the full credit method results in any unfairness to them. In these circumstances, we conclude that the trial court properly determined the amount of damages.

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[39] *See, e.g.*, Wise v. Anderson, Tex. Sup. Ct. 1962, 359 S.W.2d 876 (fraud); Beck v. American Rio Grande Land & Irrigation Co., Tex. Civ. App. 1931, 39 S.W.2d 640 (writ ref'd).

VIII.

It is also contended that the trial court erred in ruling on certain evidentiary matters. The first concerns the trial court's decision to admit into evidence, over defendants' objection, several cards that Borel had used to refresh his memory while his disposition was being taken. The card contained the names of various products manufactured by the defendants and the dates and locations when Borel had used each product. The defendants renew their objection that the cards were inadmissible hearsay.

In general, a writing used to refresh a witness's memory is not testimony and is inadmissible when offered by the witness's party. This does not mean, however, that it is always error for the trial court to permit the jury to inspect such a writing. It may be admitted, for example, when offered by the opposing party or when the jury on its own motion requests to see it. It may also be admitted when the trial court determines that its inspection would assist the jury in understanding the evidence and would not be prejudicial to the opposing party.[40] The rules on admissibility of such writing "should not be treated as dogmas of inherent efficiency. They are merely crude rules of thumb .... The trial court's discretion should control". Wigmore, Evidence, § 764 (3ed).

During his thirty-three years as an industrial insulator, Borel was employed for varying periods at many locations and used several different products containing asbestos. The six defendants manufacture a wide variety of products under different brand-names. In these circumstances, the trial court could justifiably believe that the jury might

[40] *See, e.g.*, McCarthy v. Boston & M. R.R., N.H. Sup. Ct. 1942, 27 Alt. 2d 97; Watkins v. Holmes, N.H. Sup. Ct. 1943, 35 Atl. 2d 395; Braden Winch Co. v. Surface Equipment Co., Okla. Sup. Ct. 1946, 165 P.2d 640.

easily be confused as to when and where Borel had used each of the defendants' products. This situation was aggravated by the fact that Borel had died before trial and only his earlier deposition was available. The defendants have not shown that they were prejudiced by the trial court's ruling. We therefore find no error.

The defendants contend that the trial court erred in refusing to admit a statement made by Borel on June 4, 1969, in an application filed as part of his workmen's compensation claim. The statement read: "Although I became ill on the last job I worked, the fact is that I have worked as an insulator for 33 years, subject to the hazards of the job and I cannot truthfully say when I contracted asbestosis." The trial court ruled that it was not an admission and therefore inadmissible hearsay or opinion. After carefully examining the record, we cannot say that the trial court abused its discretion in so ruling or that the error, if any, was prejudicial to the defendants.

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IX

In reaching our decision in the case at bar, we recognize that the question of the applicability of Section 402A of the *Restatement* to cases involving "occupational diseases" is one of first impression. But though the application is novel, the underlying principle is ancient. Under the law of torts, a person has long been liable for the foreseeable harm caused by his own negligence. This principle applies to the manufacture of products as it does to almost every other area of human endeavor. It implies a duty to warn of foreseeable dangers associated with those products. This duty to warn extends to all users and consumers, including the common worker in the shop or in the field. Where the law

has imposed a duty, courts stand ready in proper cases to enforce the rights so created. Here, there was a duty to speak, but the defendants remained silent. The district court's judgment does no more than hold the defendants liable for the foreseeable consequences of their own inaction.

For the reasons stated, the decision of the district court is

AFFIRMED

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals,
Fifth Circuit

By Louise Wolf, Deputy

New Orleans, Louisiana
July 11, 1974

A-50

CLARENCE BOREL, PLAINTIFF-APPELLEE,

v.

FIBREBOARD PAPER PRODUCTS CORPORATION ET AL., DEFENDANTS-APPELLANTS, NATIONAL SURETY CORPORATION, INTERVENOR-APPELLEE.

No. 72-1492.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

May 13, 1974.

Action by insulation worker against manufacturers of insulation materials containing asbestos to recover for injuries caused by defendants' alleged breach of duty in failing to warn of dangers involved in handling asbestos. The United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, Chief Judge, entered judgment in favor of plaintiff, and defendants appealed. The Court of Appeals, Wisdom, Circuit Judge, on rehearing, held that jury's finding against defendants on the issue of failure to warn was not incorrect as a matter of law. In any event, there was significant evidence to create a question as to the adequacy of the labels to serve as warnings.

Petition for rehearing denied.

1. Products Liability ▶▶ 88

In action by insulation worker against manufacturers of insulation materials containing asbestos to recover for injuries caused by defendants' alleged breach of duty in fail-

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ing to warn of dangers involved in handling asbestos, the jury could have concluded, within trial judge's instructions, that the "cautions" appearing on the packages of certain of defendants' products were not warnings in the sense that they adequately communicated to plaintiff and other insulation workers knowledge of the dangers to which they were exposed so as to give them a choice of working or not working with a dangerous product.

2. Products Liability ➤➤ 88

In action by insulation worker against manufacturers of insulation materials containing asbestos to recover for injuries caused by defendants' alleged breach of duty in failing to warn of dangers involved in handling asbestos, jury's finding against defendants on the issue of failure to warn was not incorrect as a matter of law. There was significant evidence to create a question as to the adequacy of labels to serve as warnings.

3. Products Liability ➤➤ 14

A seller may be liable to the ultimate consumer or user for failure to give adequate warnings as to the hazardous nature of the product; the seller's warning must be reasonably calculated to reach such persons and the presence of an intermediate party will not by itself relieve the seller of such duty.

4. Products Liability ➤➤ 42

The utility of an insulation product containing asbestos might outweigh the known or foreseeable risks to insulation workers and thus justify its marketing, but the product could still be unreasonably dangerous if unaccompanied by adequate warnings.

5. Products Liability ⏩ 83

In action by insulation worker against manufacturers of insulation materials containing asbestos to recover for injuries caused by defendants' alleged breach of duty in failing to warn of dangers involved in handling asbestos, jury could have properly decided, on the evidence before it, that plaintiff received no warnings at all from any defendant at a time when they were under a duty to warn him, or, with respect to three defendants who did issue watered down "cautions," the jury could properly have held on the evidence that those warnings were inadequate to communicate to plaintiff knowledge of the hazards to which he was being exposed.

6. Products Liability ⏩ 88

In action by insulation worker against manufacturers of insulation materials containing asbestos to recover for injuries caused by defendants' alleged breach of duty in failing to warn of dangers involved in handling asbestos, jury acted within its proper function in finding, in respect to the issue of strict liability, that plaintiff did not "voluntarily and unreasonably" proceed "to encounter a known danger."

7. Products Liability ⏩ 96

Although the trial court, in action by insulation worker against manufacturers of insulation materials containing asbestos to recover for injuries caused by defendants' alleged breach of duty in failing to warn of dangers involved in handling asbestos, rejected defendants' proffered instructions on assumption of risk or volenti non fit injuria, the court did in fact inform the jury, by an instruction which was actually overly favorable to defendants, that assumption of risk is a defense to a strict liability action.

8. Products Liability ➤ 27

Under Texas law, contributory negligence or assumption of risk is not a defense to an action based on strict liability when the injured party does not deliberately encounter a risk the existence of which he knows; but it will be a defense when it consists of voluntary and unreasonable conduct to encounter a known use.

Appeal from the United States District Court for the Eastern District of Texas.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 10, 1973, 5 Cir., 1973, ... F.2d .....)

Before TUTTLE, WISDOM and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge:

All of the defendants-appellants have moved for a rehearing en banc.

I.

Three of the movants, Johns-Manville Corporation, Fibreboard Corporation, and Ruberoid Company contend that the Court erred in basing its opinion on "the overriding factor" of "the alleged failure of the defendants to at any time warn Borel of the dangers involved in working with asbestos insulation while employed by various independent contractors". They state that the record shows that Johns-Manville placed a warning label on packages of its products in 1964, and that Fibreboard and Ruberoid placed warning labels on their products in 1966. (Borel filed suit in 1969.) The three warnings were substantially the same. Johns-Manville's read as follows:

> **"This product contains asbestos fiber.**
>
> **"Inhalation of asbestos in excessive quantities over long periods of time may be harmful.**
>
> **"If dust is created when this product is handed, avoid breathing the dust.**
>
> **"If adequate ventilation control is not possible wear respirators approved by the U. S. Bureau of Mines for pneumoconiosis producing dusts."**

It should be noted that none of these so-called "cautions" intimated the gravity of the risk: the danger of a fatal illness caused by asbestosis and mesothelioma or other cancers. The mild suggestion that inhalation of asbestos in excessive quantities over a long period of time "*may* be harmful" conveys no idea of the extent of the danger. The admonition that a worker should "avoid breathing the dust" is black humor: There was no way for insulation workers to avoid breathing asbestos dust. As for wearing respirators if adequate ventilation control is not possible, Borel and other insulators never worked in any place where there was adequate ventilation and respirators were ineffective: "you can't breathe with the respirator".[1]

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[1] As the opinion points out: "When asked about the use of respirators, Borel replied that they were not furnished during his early work years. Although respirators were later made available on some jobs, insulation workers, usually were not required to wear them and had to make a special request if they wanted one. Borel stated that he and other insulation workers found that the respirators furnished them were uncomfortable, could not be worn in hot weather, and — 'you can't breathe with the respirator.' Borel further noted that no respirator in use during his lifetime could prevent the inhalation of asbestos dust. As an alternative precaution, therefore, he would sometimes wear a wet handkerchief over his nostrils or apply mentholatum, but these methods were also unsatisfactory and did not exclude all the dust."

[1] Within the trial judge's instructions, the jury could have concluded that the "cautions" were not warnings in the sense that they adequately communicated to Borel and other insulation workers knowledge of the dangers to which they were exposed so as to give them a choice of working or not working with a dangerous product. Our opinion points out:

> "Borel said that he had known for years that inhaling abestos dust "was bad for me" and that it was vexatious and bothersome, but that he never realized that it could cause any serious or terminal illness. Borel emphasized that he and his fellow insulation workers thought that the dust "dissolves as it hits your lungs". (Op. 3 p., — F.2d)

We quoted Borel's testimony:

> "A. Yes, I knew the dust was bad but we used to talk [about] it among the insulators, [about] how bad was this dust, could it give you TB, could it give you this, and everyone was saying no, that dust don't hurt you, it dissolves as it hits your lungs. That was the question you get all the time.
>
> Q. Where would you have this discussion, in your Union Hall?
>
> A. On the jobs, just among the men.
>
> Q. In other words, there was some question in your mind as to whether this was dangerous and whether it was bad for your health?
>
> A. There was always a question, you just never know how dangerous it was. I never did know really. If I had known I would have gotten out of it.
>
> Q. All right, then you did know it had some degree of danger but you didn't know how dangerous it was?
>
> A. I knew I was working with insulation.
>
> Q. Did you know that it contained asbestos?
>
> A. Yes, sir, but I didn't know what asbestos was."

[2] The evidence established that Borel was exposed to the products of each of these appellants for extended periods occurring before the alleged warnings were given. Since the disease of asbestosis is cumulative, these earlier exposures to asbestos dust from appellants' products could have contributed substantially to Borel's overall condition. Borel was an insulator for 33 years. Three of the six defendants gave no warnings. The other three used labels on packages of their products, as quoted in this opinion; but this practice began a few years before his terminal illness in 1969. By 1964-66, his illness was irreversible. Thus, there were no warnings when they could have effectively allowed Borel to make the choice of encountering or not encountering a known risk. And, in any event, there was significant evidence to create a question for the jury as the adequacy of the labels to serve as warnings. We cannot say that its resolution of this issue is incorrect as a matter of law. Planters Manufacturing Co. v. Protection Mut., Ins. Co., 5 Cir. 1967, 380 F.2d 869; Helene Curtis Industries, Inc. v. Pruitt, 5 Cir. 1967, 385 F.2d 841; Boeing Co. v. Shipman, 5 Cir. 1969, 411 F.2d 365, 374.

[3] The appellants are in the anomalous position of arguing that (1) the danger was obvious; (2) yet three issued no semblance of a warning and three posted diluted "cautions" which might alert the contractor-purchasers, but not the workers, the final users; and (3) all admit that they never conducted any tests to determine the extent of the danger. In their original briefs, on the issue of liability they seem to rely primarily on the "cautions" to the independent contractors, the purchasers, as if their potential liability ceased to exist before their products reached the ultimate users. That is not the law. We agree with the Restatement: a seller may be liable to the *ultimate* consumer or user for failure to give adequate warnings. The seller's warning must be reasonably

calculated to reach such persons and the presence of an intermediate party will not by itself relieve the seller of this duty. Sterling Drug Inc. v. Cornish, 8 Cir. 1966, 370 F.2d 82; Yarrow v. Sterling Drug, 8 Cir. 1969, 408 F.2d 978; Noel, Products Defective Because of Inadequate Directions or Warnings, 23 S.W.L.J. 256 (1969).

[4] Taking our original opinion as a whole, it should be clear that our references to failure to warn refer to failure to warn of the gravity of the danger, that is, the exposure to asbestosis, mesothelioma and other cancers. The first sentence of the opinion states that the case involves "the scope of an asbestos manufacturer's duty to warn". At a number of points we emphasize that the plaintiff's contentions focused on the "*adequacy*" or reasonableness of the warnings.[2] The utility of an insulation product containing asbestos may outweigh the known or foreseeable risk to the insulation workers and thus justify its marketing. The product could still be unreasonably dangerous, however, if unaccompanied by adequate warnings. An insulation worker, no less than

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[2] "The plaintiff contended that the defendants' products were unreasonably dangerous because of the failure to provide adequate warnings of the foreseeable dangers associated with them." (Op. p. 13, ... F.2d p. .....)

"Here, the plaintiff alleged that the defendants' product was unreasonably dangerous because of the failure to give adequate warnings of the known or knowable dangers involved." (Op. p. 17, ... F.2d p. .....)

"But, as comment k makes clear, even when such balancing leads to the conclusion that marketing is justified, the seller still has a responsibility to inform the user or consumer of the risk of harm. The failure to give adequate warnings in these circumstances renders the product unreasonably dangerous." (Op. p. 18, ... F.2d p. .....)

"The failure to give adequate warnings in such circumstances can render the product unreasonably dangerous." (Op. p. 24, ... F.2d p. .....)

"As previously discussed, when a failure to give adequate warning is alleged to have made a product unreasonably dangerous, . . ." (Op. p. 30, ... F.2d p. .....)

any other product user, has a right to decide whether to expose himself to the risk.

The district court correctly charged the jury:

> "As you know, one of the acts of negligence contended for by the plaintiff and perhaps the principal act of negligence is that the manufacturer should have given a warning or a proper warning as to the use of its product. The Court would instruct you that a manufacturer of goods has a duty to give reasonable warning as to the dangers inherent or reasonably foreseeable in using his product. The defendants are under an obligation and duty to give reasonable warning as to danger of their products, even if the product or products is not being used in a specific manner, so long as the use to which the product was put was a use that the manufacturer could reasonably foresee."

[5] The unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized; that the United States Public Health Service documented the significant risk in asbestos textile factories in 1938; that the Fleischer-Drinker report was published in 1945; that in 1961 Dr. Irving Silikoff and his colleagues confirmed the deadly relationship between insulation work and asbestosis. In January 1969 Borel's illness was diagnosed as irreversible pulmonary asbestosis. During his working years, he received no warnings of any kind from three of the six defendants. The other three defendants issued no warnings until 1964-66, by which time adequate warnings would have come too late for Clarence Borel. On the evidence before it, the jury could properly have decided that Borel received no warnings at all from any defendant at a time when the defendants were under a duty to warn him. Or, with respect to the three defendants who issued watered down "cautions", the jury could properly have held that these warnings were inadequate to communicate to Borel knowledge of the hazards to which he was exposed.

II.

The movants agrue that the decision should be reversed because Borel knew of the danger, and the jury so found.

The plaintiff's cause of action is based on both negligence and strict liability. The district court correctly distinguished one from the other. The jury understoood the distinction, for it found that Borel was guilty of contributory negligence but it returned a verdict in favor of Borel on the theory of strict liability.

Section 402A, comment n, on the Restatement of the Law of Torts, deals with contributory negligence and that form of negligence which "commonly passes under the name of assumption of risk"; the two overlap in actions based on strict liability:

> "n. Contributory negligence. Since the liability with which this section deals is not based upon negligence and the seller, but is strict liability, the rule applied to strict liability cases [see § 524] applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in *voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense* under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds *unreasonably* to make use of the product and is injured by it, he is barred from recovery."

[6] Here the jury acted within its proper functions in finding, in effect, that Borel did not "voluntarily and unreasonably" proceed "to encounter a known danger".

Nor was the evidence so compelling that reasonable and fair-minded persons would have to conclude Borel "discover[ed] the defect and [was] aware of the danger, and nevertheless proceed[ed] unreasonably to make use of the products". 2 Restatement of Law of Torts (2d ed. 1965) § 402A at 356; Boeing Company v. Shipman, 5 Cir. 1969, 411 F.2d 365, 374.

III.

The trial court submitted this case to the jury on general instructions and special interrogatories, not "on general verdicts accompanied by a special interrogatory as to Borel's contributory negligence," as stated in the original opinion and as stated by defendants' counsel in objecting to certain portions of the jury charge.

Counsel for the defendants objected to the trial court's not submitting to the jury a special interrogatory based on assumption of risk or volenti non fit injuria. Counsel alluded, however, to the Court's having "covered it to some extent in the general charge". On the motion for a rehearing the movants contend that this Court erred in holding, contrary to Texas law, that under the doctrine of volenti non fit injuria, as a matter of law, Borel's continuing to expose himself to asbestos dust was "unreasonable". They assert, however, that "in effect, the jury found that Borel was not acting as a reasonable man". Moreover, they say that the Court erred in concluding that the jury found that Borel had not assumped the risk; that "no such finding was ever made by the jury as the matter was not submitted to it except in the contributory negligence issue". The defendants timely requested the trial court to submit special interrogatories on voluntary assumption of risk or volenti. When these were refused, the defendants ob-

jected to the court's instructions that neither assumption of risk nor contributory negligence would be a defense to an action on the theory of breach of warranty. They renew their argument on the motion for a rehearing and contend that the Court erred in making an *Erie* judgment that volenti is not a defense in this products liability action in Texas.

We made no such holding, in our original opinion.

We realized, as we said, that "The applicability of *volenti* or contributory negligence defense in a strict liability action is unclear under Texas law". We noted, however, that the Texas Supreme Court has quoted and followed, in part, the position taken in comment n to Section 402A of the Restatement, quoted earlier in this opinion, and that the Court quoted with approval Prosser, Law of Torts (3 ed.) 656. Shamrock Fuel & Oil Sales v. Tunks, 416 S.W.2d 779 (Tex.Sup.Ct.1967). We relied, too, on Messick v. General Motors Corp., 5 Cir. 1972, 460 F.2d 485, in which this Court concluded that Texas courts would probably follow comment n to Section 402A. We stated in our original opinion, therefore, that continued use of a product known to be defective would be a defense to a strict liability action *only* when the continued use was "voluntary" and "unreasonable". Compare Dean Keaton's observation: "First, assumption of risk requires a deliberate encounter with a known risk. Mere negligence in failing to discover a risk is no defense under this doctrine. A person does not deliberately encounter a risk if he does not know it exists. Moreover, the encounter must be voluntary. Therefore, the defense is inapplicable when the injured party had a rational alternative to taking the risk". Keaton, Strict Liability for Product Design, 52 Tex.L.Rev. 81, 89 (1973). Dean Wade takes the same position. Wade, Strict Tort Liability, 19 S.W.L.J. 5, 21 (1965.)

[7] Notwithstanding its rejection of the defendant's proffered instructions, the trial court in this case did in fact inform the jury that assumption of risk was a defense to a strict liability action. He stated:

> [T]he defendants contend that the deceased, Mr. Borel, knew of the dangerous nature of the asbestos product manufactured by the defendants in connection with his insulation work and appreciated the danger and with such knowledge voluntarily assumed the risk by continuing his employment. Further, that this knowledge of the danger of the insulation was known to Mr. Borel's contractor or employer. Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the deceased knew of the dangerous nature of the asbestos products with which he was working and appreciated the danger of working with such products or that he had knowledge through his contractor of the dangerous nature of the product and that he assumed the risk by continuing his work, then you would find against the plaintiff and in favor of the defendants.

What more could the defendants want? We considered the instruction overly favorable to the defendants. Notwithstanding, the jury still found against the defendants, in effect, therefore, finding that Borel did not assume the risk.

[8] Ford Motor Co. v. Henderson, 500 S.W.2d 709 (Tex. Civ.App.1973), on writ of error to the Texas Supreme Court, is not contrary to our holding in the instant case nor to anything we said in the original opinion or in this opinion on rehearing. In that case the Court quoted with approval, as we did, comment n of Section 402A of the Restatement and Prosser, Law of Torts (3d Ed.) 656, both relied on in Shamrock Fuel & Oil v. Tunks. Dean Prosser was the Reporter for the Restatement of Torts and the quotation from his treatise parallels Section 402A. The

language of the majority in Ford Motor Company v. Thompson is consistent with Shamrock v. Tunks and with the Borel opinion. In all three cases the courts recognize that contributory negligence or assumption of risk is not a defense to an action based on strict liability when the injured party does not deliberately encounter a risk the existence of which he knows. But it will be a defense "when it consists of a voluntary and unreasonable [Dean Keaton would say "not rational"] conduct to encounter a known risk". (Op. 40, ... F.2d p. .....).

The actual holding in *Ford* was only that the manufacturer was entitled to submit to the jury as a special issue the defense of contributory negligence or voluntary assumption of risk. The defendant had contended that "the jury could have concluded under the evidence that Mrs. Henderson [the injured party] discovered the defect"; that then she "unreasonably proceed[ed] to encounter a known danger". 500 S.W.2d 709. There is a reference in the majority opinion to the plaintiff's "failure to use ordinary care in continuing to use a product after the discovery of a defect [which] is available as a defense in this state". But the majority supported this holding by a quotation from Section 402A, comment n, and twice scored the word "unreasonably". It is evident, therefore, that the Court had no intention to depart from the Restatement. Moreover, Justice Stephenson, for the majority, quoted Justice Norvell in Shamrock Fuel & Oil Co. v. Tunks to the effect that the cases which refuse to allow the defense of contributory negligence "are entirely consistent with the general rule that such negligence is not a defense to an action founded upon strict liability. . . . They represent the form of contributory negligence which consists of deliberately and unreasonably proceeding to encounter a known danger, and overlaps assumption of risk". 500 S.W.2d 709, 710.

The difference between *Borel* and *Ford* is that in *Borel* the trial judge put to the jury the analogous question the trial judge erroneously rejected in *Ford*.

The dissent in *Ford* gives no aid and comfort to the defendants in the instant case. Justice Dies, dissenting, argues that even if Mrs. Henderson, the injured party, discovered a defect in the product, "unknown before to her, and not caused by her", she is not required to make "a wiser choice of her options" than the choice she made.

There is, therefore, no reason to withhold the issuance of this opinion pending the decision of the Texas Supreme Court in Ford Motor Co. v. Henderson.

IV.

The trial court correctly decided that limitations was not an issue in the case. The reference in our opinion to Gaddis v. Smith, 417 S.W.2d 577 (Tex.S.Ct.1967) and the discussion pertinent to *Gaddis* are unnecessary to our decision, which we rest squarely on Campbell v. Sonford Chemical Co., 486 S.W.2d 932 (Tex.S.Ct.1972).

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Louise Wolf
Deputy
New Orleans, Louisiana JUL 11 1974

VERNON'S TEXAS CIVIL STATUTES
PERSONAL INJURIES

Art. 8306, sec. 20. "Injury" and "personal injury" defined; occupational diseases, what are

Sec. 20. Wherever the terms "injury" or "personal injury" are used in the Workmen's Compensation Law of this state, such terms shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom. Unless from the context the meaning is clearly to the contrary, such terms shall also be construed to mean and include occupational diseases, as hereinafter defined. The following diseases only shall be deemed to be occupational diseases:

(a) Poisoning by: (1) Aluminum Trioxide; (2) Arsenic; (3) Benzol or its homologues and derivatives; (4) Beryllium; (5) Cadmium; (6) Carbon Bisulphide; (7) Carbon Dioxide; (8) Carbon Monoxide; (9) Chlorine; (10) Cyanide; (11) Formaldehyde; (12)Halogenated Hydrocarbons; (13) Hydrochloric Acid; (14) Hydrofluoric Acid; (15) Hydrogen Sulphide; (16) Lead; (17) Manganese; (18) Mercury; (19) Methanol (Wood Alcohol); (20) Methanol Chloride; (21) Nitrous Fumes; (22) Nitric Acid; (23) Petroleum or Petroleum Products; (24) Phosphorus; (25) Selenium; (26) Sulphuric Acid; (27) Sulphuric Dioxide; (28) Sulphur Trioxide; (29) Tellurium; (30) Thallium; (21) Zinc;

(b) Anthrax caused by handling of wool, hair, bristles, hides and skins;

(c) Blisters caused by prolonged or repeated use of tools or mechanical appliances;

(d) Synovitis, Tenosynovitis, or Bursitis due to an oc-

cupation involving continued or repeated pressure on the parts affected;

(e) Chrome ulceration;

(f) Compressed air illness;

(g) Dermatitis; that is, inflammation of the skin due to oil, cutting compounds or lubricants, dust, liquids, fumes, gases or vapors;

(h) Diseased condition caused by exposure to x-rays or radio-active substances;

(i) Diseased condition of the eyes due to electric arc and welding, and cataract in glass workers;

(j) (Epitheliomatous cancer) or ulceration of the skin or the corneal surface of the eye caused by tar, pitch, bitumen, mineral oil or paraffin or any compound, product or reside of any of these substances;

(k) Glanders and other diseased conditions caused in handling any equine animal or the carcass of any such animal;

(l) Infections or contagious disease contracted in the course of employment in or in immediate connection with a hospital or sanitorium in which persons or animals suffering from such disease are cared for or treated;

(m) Nystagmus incurred in underground work;

(n) Asbestosis;

(o) Silicosis;

(p) Psittacosis (ornithosis) caused by the handling or processing of meat and poultry. Added Acts 1947, 50th Leg., p. 176, ch. 113, § 2, as amended Acts 1955, 54th Leg., p. 662, ch. 233, § 1.

Complete Text of Article 8306, see pp. 10 to 39.

Historical Note

The amendment of 1955 added the occupational disease of Pstittacosis (ornithosis) contained in item (p).

Cross References

Enumerated and concurrent injuries, see art. 8306, § 12.
Injury sustained in course of employment, definitions, see art. 8309, § 1.

Occupational disease, compensation, see art. 8306, § 25.

Law Review Commentaries

Highlights of the occupational disease amendment. John Peace, 15 Texas Bar. J. 147, 171 (1952).

Notes of Decisions

Construction and application 1

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Library references

Workmen's Compensation ➤547 et seq. C.J.S. Workmen's Compensation § 169 et seq.

1. Construction and application

For purpose of workmen's compensation, "industrial accident" or "accidental injury" can always be traced from definite time, place, and cause, whereas "industrial disease" is of slow and gradual development, and its time, place,

and cause are not susceptible of definite ascertainment. Frazier v. Employers Mut. Cas. Co. (Civ. App. 1963) 368 S.W.2d 955, ref. n. r. e.

Not all occupational diseases are compensable. Id.

2. Instructions and special issues

Issue inquiring whether disability resulted within one year after workmen's compensation claimant's last injurious exposure to occupational disease was meaningless, and issue should have been submitted in form seeking determination whether incapacity occurred within one year after exposure to hazards or causes of the disease. Travelers Ins. Co. v. Miller (Civ. App. 1965) 390 S.W.2d 284.

3. Review

Claimant whose alleged spasmodic torticollis came on insiduously over a period of about one year's time as result of her work had contracted "occupational disease" and not sustained "injury" or "accidental injury" within the Workmen's Compensation Act. Frazier v. Employers Mut. Cas. Co. (Civ. App. 1963) 368 S.W.2d 955, ref. n. r. e.

Art. 8306, sec. 26. Silicosis and asbestosis

Sec. 26. (a) Wherever used in this section "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by inhalation of silica dust. "Asbestosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust.

(b) In the absence of conclusive evidence in favor of the claimant, disability or death from silicosis or asbestosis shall be presumed not to be due to the nature of any employment within the provision of this section, unless during the ten (10) years immediately preceding the date of in-

capacity the employee has been exposed to the inhalation of silica dust or asbestos dust over a period of not less than five (5) years, two (2) years of which shall have been in this state, under a contract of employment existing in this state; provided, however, that if the employee shall have been employed by the same employer during the whole of such five (5) year period, his right to compensation against the association shall not be affected by the fact that he has been employed during any part of said period outside this state; change or changes of employer. The Board shall make reasonable rules and regulations relative to the form, execution, filing or registration and public inspection of waivers or records thereof. Added Acts 1947, 50th Leg., p. 178, ch. 113, § 8, as amended Acts 1957, 55th Leg., p. 1186, ch. 397, § 1.

Complete Text of Article 8306, see pp. 10 to 39.

Historical Note

The 1957 amendment, effective September 1, 1957, omitted from the end of paragraph (d) the following: "as provided in Section 7 of Article 8306."

For savings provisions and provisions relating to severability and to repeal of conflicting laws, see note under art. 8306, § 7.

Cross References

Medical aid and hospital services, see art. 8306, § 7.

Law Review Commentaries

Occupational disease under the Workmen's Compensation Law. Alto V. Watson, 27 Texas Bar J. 233, 234 (1964)

Library References

Workmen's Compensation ➤549, 961, 983.
C.J.S. Workmen's Compensation §§ 169, 266 et seq., 272.

Art. 8306, sec. 27. Acute state of certain diseases, compensation only during

Sec. 27. In any case wherein the employment causes an acute disease, condition or allergy which can be arrested by a change of employment or by medical treatment under which the employee will suffer no objective symptoms of such disease, condition or allergy, the employee shall be entitled to compensation only for the period during which said disease, condition or allergy persists in an acute state. Added Acts 1947, 50th Leg., p. 179, ch. 113, § 9.

Complete Text of Article 8306, see pp. 10 to 39.

Law Review Commentaries

Diseases compensable as accidental injuries. 26 Texas L.Rev. 830 (1948).

Occupational disease under the Workmen's Compensation Law. Alto v. Watson, 27 Texas Bar J 233, 234 (1964).

KASCH ET AL. v. ANTON ET UX.

COURT OF CIVIL APPEALS OF TEXAS. AUSTIN.

APRIL 17, 1935., 81 SW(2d) 1097, 1100

1. Trial ➤129

Designating in argument which issues should be answered in affirmative and which in negative to enable client to recover *held* improper, where jury disregarded court's instructions and answered questions as directed by counsel, but not to require reversal where argument was invited.

2. Trial ➤ 352(5)

Issue submitting whether plaintiff was contributorily negligent in failing, "if he did," to keep proper lookout as he approached intersection after seeing truck *held* erroneous as duplicitous, and defensive nature of issue did not cure defect.

3. Trial ➤ 355(1)

Where issue is submitted in improper form, jury's answer to question is immaterial.

4. Trial ➤ 352(5)

Defendant pleading contributory negligence is entitled to have each issue of defense based on pleadings and evidence submitted separately and distinctly as much so as plaintiff on charge of primary negligence (Vernon's Ann. Civ. St. arts. 2189, 2190).

5. Evidence ➤ 65

In suit for injury sustained in automobile accident, evidence that owner of motor-truck had not instructed driver as to "law of the road" *held* inadmissible, since every man is presumed to know the law (Pen. Code 1925, art. 801 (E).

6. Master and servant ➤ 300

Master's liability for servant's negligent acts in course of employment and in furtherance of master's business cannot be predicated upon master's failure to instruct servant in law of the land.

Appeal from District Court, Caldwell County; M. C. Jeffrey, Judge.

Suit by Herman Anton and wife against Ed. Kasch and another. From a judgment for plaintiffs, defendants appeal.

Reversed and remanded.

R. H. Mercer, of San Antonio, and R. E. McKie, of San Marcos, for appellants.

C. F. Richards, of Lockhart, J. R. Fuchs, of New Braunfels, and Will G. Barber, of San Marcos, for appellees.

BAUGH, Justice.

This suit arose out of a collision between a Ford coupe, belonging to and driven by Herman Anton, and a 1½-ton Chevrolet truck, owned by Ed. Kasch and driven by Gregorio Flores, his employee, on the highway between San Marcos and Lockhart, near the village of Martindale, on January 5, 1933. Anton and his wife were enroute from San Marcos to Lockhart. At the place of collision, a rural road crossed the highway at right angles. The driver of the truck undertook to cross the highway approaching from Anton's left-hand side, and was struck by the front end of Anton's car near the cab of such truck, while Anton was traveling on his right-hand side of the highway. Both the car and the truck were practically demolished, and Anton's wife seriously injured. The damages sought were for personal injuries to both Anton and his wife, and for damages to his car. The case was tried to a jury upon special issues and upon their answers thereto judgment rendered against Kasch and Flores jointly and severally for $10,637, of which $10,000 was for personal injuries to Mrs. Anton. Hence this appeal.

The grounds of negligence alleged as against Flores, the driver of the truck, were: Failure to keep a proper lookout in approaching said highway; failure to sound his horn

or otherwise indicate his intention to cross the highway; and failure to yield the right of way to Anton who was approaching the intersection on the main thoroughfare from Flores' right. And as against Kasch, failure to instruct his employee, Flores, in the "law of the road," as embodied in subdivision (E) of article 801, Penal Code 1925.

In addition to general and special exceptions and general and special denials, appellants alleged in defense that Anton was guilty of contributory negligence, proximately causing the collision, among other things, in the following respects, all of which were submitted to the jury: In the rate of speed at which he was traveling as he came to said road intersection; in failing to keep a proper lookout; in failing to apply his brakes or otherwise slow down; in failing to sound his horn; in failing to stop or slow down so as to enable Flores to cross said highway; in driving his car with its windshield blurred and defective; in attempting to pass in front of said truck at a dangerous rate of speed; in failing to keep his car under proper control after seeing the truck approaching the intersection; in speeding up his car after he discovered the truck approaching the intersection; and, lastly, that the collision was an unavoidable accident.

The case was submitted to the jury on 42 special issues. The first ten of these presented the issues of negligence alleged against Kasch and Flores; issues 11 to 23, the elements and amounts of damage; and issues 24 to 38, the defenses of contributory negligence charged against Anton. The other special issues are unimportant here.

[1] The first contention made by appellants relates to argument of appellees' counsel to the jury. The argument complained of was as follows: "My associates have called your attention as to how these issues should be answered,

that issues numbers one to 23 inclusive should be answered 'yes'. The defendant Kasch will lose nothing by your verdict if your answers are confusing and contradictory. The plaintiff needs every issue answered without a conflict to win. What I am trying to say to you is that the plaintiff is trying to get a verdict, and if your answers are conflicting there will be nothing for the court to do but to set aside your verdict and it will be all to do over again. If you gentlemen see the case as we do, and if the facts call for it, we are entitled to have the first 23 issues, except those calling for an amount, answered 'yes', and the balance of them answered 'no', except as to amounts of money; and the last issue we feel should be answered that it was not the result of an unavoidable accident."

The objection made and overruled was that it was an attempt to tell the jury the legal effect of their answers to the questions asked. The jury answered the first 23 questions, except as to amounts, "Yes"; and answered the next fifteen "No", some of which, based upon a preceding question, they were instructed by the court that they need not answer. As was stated in H. E. & W. T. Ry. Co. v. Sherman (Tex. Com. App.) 42 S.W.(2d) 241, 247, it would appear, therefore, that the jury followed the suggestion of counsel in answering said questions, rather than the instruction of the court.

We think that the effect of the argument above quoted was to tell the jury that if the plaintiffs were to recover, the questions referred to must be answered as suggested by counsel. While counsel intimated that to answer them otherwise would create a conflict, nullifying their verdict, such would not have been the result. Finding Anton guilty of contributory negligence would create no conflict with finding the defendants guilty of negligence. A request of counsel that the jury avoid a conflict in their findings,

going no further than that, would not constitute error. Indemnity Ins. Co. v. Garsee (Tex. Civ. App.) 54 S.W.(2d) 817, 820. But counsel in the above-quoted argument, we think, went much further than that. And it has been repeatedly held that it is error for counsel to inform the jury how they must answer special issues to enable the plaintiff to recover. Such method of answering special issues is inimical to the very purpose of submitting a case on special issues, a method designed to elicit findings of the jury, under the evidence, on the issues made irrespective of the result of their findings upon the final judgment of the court thereon. McFaddin v. Hebert, 118 Tex. 314, 15 S.W.(2d) 213; Texas & P. Ry. Co. v. Edwards (Tex. Com. App.) 36 S.W.(2d) 477; H. E. & W. T. Ry. Co. v. Sherman, supra; Dallas Ry. & Terminal Co. v. Bankston (Tex. Com. App.) 51 S.W.(2d) 304; Speer's Law of Special Issues, § 326; Clements v. Wright (Tex. Civ. App.) 47 S.W.(2d) 652.

It appears, however, from the trial court's qualification of appellants' bill of exception that substantially the same method of argument was adopted by counsel for appellants. That one of appellants' counsel in his argument to the jury in effect admitted that Flores was guilty of negligence, but insisted that Anton was guilty of contributory negligence, and, after discussing issues 24 to 38, told the jury that if "from the evidence, they found and answered that the plaintiff was guilty of any act of contributory negligence, that he was not entitled to recover one cent in this cause." From the court's qualification of the bill, therefore, it apears that the improper argument was invited, and that counsel for appellants committed the same errors of which they complain here. Since we have concluded that the case must be reversed for other reasons, the foregoing issue is discussed in view of another trial.

[2-4] The next contention which we deem it necessary to discuss complains of the manner in which the trial court, over appellants' objection, submitted the issues of contributory negligence of Anton, pleaded by appellants and raised by the evidence. While the various grounds of contributory negligence alleged were separately submitted, and separate complaints are made as to each of them, the same error is charged as to all and equally applicable to each. We will, therefore, discuss only special issue No. 25 as typical. This issue reads as follows: "Do you find from a preponderance of the evidence, that Herman Anton was guilty of contributory negligence, as that term is hereinbefore defined, in failing (if he did) to keep a proper lookout as he continued toward the intersection after seeing the Flores truck? Answer 'yes' or 'no' as you may find the fact to be."

To which issue the jury answered, "No."

To this issue appellants objected and tendered separate issues inquiring: (1) Whether Anton failed to keep a proper lookout as he approached the road intersection; (2) whether such failure, if so found, was negligence; and (3) if so, was it a proximate cause of the collision. Undoubtedly, the issues requested by appellants constituted a proper method of submission. That the issue as presented to the jury was duplicitous there now seems to be no question. Texas-Louisiana Power Co. v. Bihl (Tex. Civ. App.) 43 S.W.(2d) 294; Stinnett v. Paramount-Famous Lasky Corp. (Tex. Comm. App.) 37 S.W.(2d) 145; K. C., M. & O. Ry. Co. v. Foster (Tex. Civ. App.) 54 S.W.(2d) 270; Clements v. Wright, supra.

In the case of Postal Tel. Cable Co. v. Darkins (Tex. Civ. App.) 26 S.W.(2d) 441, Supreme Court 44 S.W.(2d) 933, a question materially, if not identically, the same as here presented was involved, and therein condemned, and the

jury's affirmative answer thereto held to amount to no finding at all. We think it is immaterial how the jury may or may not answer such improper question. In K. C., M. & O. Ry. Co. v. Foster, supra, the jury answered a similar question "No." The result is, we think, the same in either event. A defendant, under a plea of contributory negligence, is entitled to have each issue of his defense made by the pleadings and the evidence submitted separately and distinctly as such so as is the plaintiff on a charge of primary negligence. Such are the provisions of the statutes (article 2189, R. S. 1925 and article 2190, as amended by Acts 1931, c. 78, § 1 (Vernon's Ann. Civ. St. art. 2190), and the well-settled rules of decision. Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S.W. 517; New Nueces Hotel Co. v. Sorenson (Tex. Com. App.) 76 S.W.(2d) 488; Ullrich v. Schramm (Tex. Civ. A pp.) 64 S.W.(2d) 1041; Meinen v. Muesse (Tex. Civ. App.) 72 S.W.(2d) 931.

Appellees earnestly insist, however, that a different situation here exists, in that said issue complained of was defensive, and had the issue been submitted in three questions, as requested by appellants, a negative answer to any one of them would have barred the defense of contributory negligence; that the necessary result of the jury's answer to said question as presented was either that Anton did not fail to keep a proper lookout, or that, if he did so fail, his failure was not negligence; and that consequently the error, if any, was harmless. With this we cannot agree. If the conclusion reached in the Darkins Case, supra, be correct, it applies with equal force to a negative answer as to an affirmative answer. True the jury could have found the facts alleged, but that such facts did not constitute negligence on the part of Anton; or that if negligent that such negligence was not a proximate cause of the collision. Such a conjecture cannot be indulged, however, as against the

rights of a litigant to have his case properly presented when he has requested the trial court to do so. It is equally as conceivable that a jury might find facts alleged but that same did not constitute negligence, when the existence of the facts found might constitute contributory negligence as a matter of law. Or, that they might find the existence was not a proximate cause of the injury, whereas, such negligence might, as a matter of law, constitute a proximate case, necessitating a disregard of the negative answer of the jury. The application of the well-settled rule announced in Fox v. Dallas Hotel Co., and repeatedly reannounced since then, cannot, therefore, be made to depend upon how the jury answers an improperly presented issue.

The same question is presented with regard to the submission of other grounds of contributory negligence alleged, but the same rule applies, and, as above stated, it is unnecessary to discuss them separately here. The error need not occur upon another trial.

[5, 6] The next contention made by appellants raises the question whether Kasch was guilty of negligence in failing to instruct his servant, Flores, of the provisions of the "law of the road." That is, the provisions of subdivision (E) of art. 801, Penal Code. Appellees pleaded such failure of Kasch as negligence. Appellants excepted to such pleadings, objected to the introduction of evidence thereon, and to the submission of such issue to the jury. Clearly we think it was erroneously submitted, and should have been stricken from the pleadings. *However violent the presumption may be that every man knows the law, it nevertheless conclusively prevails. Such presumption applied as much to Flores, or Anton, as it did to Kasch; and it would be a strange doctrine of negligence to hold that Kasch was negligent in faiilng to tell Flores something that he is in law*

conclusively presumed to know. (italics ours). No more duty rested upon Kasch to inform Flores of the provisions of this subdivision of art. 801, Penal Code, than to inform him of the provisions of any or all of the other 13 subdivisions of said article; or, for that matter, of any provision of the Penal Code relating to the use of motor vehicles upon the highways. The master is liable for the negligent acts of the servant done within the scope of his employment and in furtherance of the master's business; but certainly negligence of the master cannot be predicated upon his failure to instruct his servant in the law of the land. This portion of appellees' pleadings should have been stricken, the evidence on said issue excluded, and the issue should not have been submitted to the jury.

Other contentions are made in appellants' brief relative to discovered peril and unavoidable accident; but under the record as presented we do not think the evidence raised them, and pretermit a discussion of them here. What we have said disposes of the material questions raised, and the errors pointed out require a reversal of the cause. The judgment of the trial court will therefore be reversed, and the cause remanded for another trial.

Reversed and remanded.

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Asbestos

DEATH VALLEY NATIONAL MONUMENT

DEFENDANT'S
EXHIBIT
1

that we might have more delegates attend these meetings, motion was withdrawn and motion made and carried that Atlanta be used as conference headquarters, however, if some other city desired to invite the conference to their city they could do so and it would be voted on. Brother E. B. Pugh then extended conference an invitation to have next Southeast Conference in Nashville, Tenn., and it was unanimously accepted.

The delegates were advised to send in the monies they have already collected on assessments in connection with expense of holding the next International Convention in the city of New Orleans which is a joint venture being supported by the affiliated locals and their membership of both the Southeast and the Southwest States Conference. All checks should be made payable to the Asbestos Workers Convention Fund and mailed to the Conference Secretary Charles White, 620 Normal Street, Memphis, Tenn., and Secretary White was further instructed to communicate these facts to the various local union financial secretary's.

President Sickles advised that after listening to the reports of the delegates to the conference that he found the workload in this area as considerably less than in any other portion of the country and that any of the idle membership of the southeast states should have no difficulty whatever obtaining employment throughout other sections of the country. At least some of the locals in every conference have a workload far in excess of the number available from within their membership and could assure them that their employment in any of these localities would be available.

During the above reports President Sickles and Vice President Howell gave helpful advice and instructions concerning problems that effected our locals.

There being no further business the meeting adjourned at 2:30 p. m.

Respectfully submitted,
CHARLES F. WHITE,
Secretary.

NEW YORK-NEW ENGLAND STATES

SYRACUSE, N. Y.
September 29, 1956.

The semi-annual meeting of the New York-New England States Conference of Asbestos Workers was held at Syracuse in Syracuse, N. Y. on September 29.

The meeting was called to order by President John R. McCormick and the following delegates responded to the roll call: Local No. 4, Buffalo, N. Y., Arthur Forton; Local No. 6, Boston, Mass., Herbert G. Anderson and George Andersen; Local No. 12, New York City, N. Y., George Rider and Patrick O'Connor; Local No. 26, Rochester, N. Y., Herbert Lord; Local No. 30, Syracuse, N. Y., John R. McCormick and Matthew Costello; Local No. 31, Providence, R. I., Prescott Jentzel and Donald Mitchell; Local No. 33, Connecticut, Joseph Murphy and James Piggott; Local No. 40, Albany, N. Y.; Robert McCaffrey and Joseph Case; Local No. 43, Springfield, Mass., E. H. Blair and Warren Retzlaff; Local No. 91, White Plains, N. Y., Harry J. Herlist.

General Secretary-Treasurer John W. Hoff was present representing the General Office.

Also in attendance as visitors were Edward Kellner and Nicholas Lucich, Local No. 12; James Rapp and Lovern Schribens, Local No. 4, Buffalo, N. Y.; Clarence Demers, Local No. 91 and M. H. Nichols, Local No. 95, Toronto, Ont., Canada.

Due to a recent operation, Brother Abram Goldberg, delégate from Local No. 6 was unable to attend this conference. Numerous delegates inquired about his health and they all wish him a speedy recovery. Brother Goldberg was replaced at this meeting by Brother George Andersen, vice president of Local No. 6.

The regular order of business was suspended for the purpose of electing officers for the coming term. The following officers were nominated and elected without contest; John R. McCormick, president, Joseph Murphy, vice president and Herbert G. Anderson, secretary-treasurer. The secretary was instructed to cast one ballot for each office.

Delegate Arthur Forton, Local No. 4, reports that work at present is fair and future prospects look very good. The construction of a new power plant and two oil refineries are expected to break at the same time. A recently negotiated agreement, which will run for two years beginning January 1, 1957, to January 1, 1959, is as follows: Effective January 1, 1957, 20 cents per hour to the pension fund, s one half cents per hour to fare fund, mechanics rate $3.15, improvers $2.20, h $8.50 per day and one paid

Delegate Herbert G. A Local No. 6, stated that situation in that area is v at present and future pros the same. The total mem Local No. 6, approximately currently employed. Bro derson requested that a c be made at this time rega report to this conference c ber 3, 1955, and printe JOURNAL of January, 19 quotation should have rea lows: "The improver sit Massachusetts has reached tions that are of great c Local No. 6 and our As This is due to the fact registered apprentices are to work on state finance Works Projects."

Due to the increasing a chest ailments among our ship within the past 15 y also from the reports o ences of other locals, arra were made with the Bo berculosis Society to portable X-ray machine i ion headquarters on two Saturdays. Approximatel cent of the membership chests and hearts X-rayed. of the numerous material the trade today have been to the State Department and Hygiene for analysis. tend to continue our inv with the hope of pinpoi cause of so many deaths years from the so called and fibrous diseases.

Delegate Patrick O'Con No. 12, reports over six men working at the pre About fifteen travelers used. Brother O'Connor the problems of the fibe terials and stated that Lo has records of the results sies taken of their decea bers.

Delegate Herbert Lord, 26, reports conditions o ment good with future also good. The work o house will begin in a additional men will be nee time.

Delegate John R. M Local No. 30, reports co the Syracuse area good a ture favorable. All me

working and an additional five travelers.

Delegate Prescott Jentzel, Local No. 31, reports work at present good with future prospects also good. Total membership 80 mechanics and 31 improvers. Six members are on traveling cards. Two large oil companies are at present negotiating for land in the Narragansett Bay area for the purpose of constructing oil refineries.

Delegate Joseph Murphy, Local No. 33, reports his membership in full employment and future prospects good. Brother Murphy, by invitation of the Owens Corning Glass Company, visited their factory in company with their representatives and discussed at length the newer methods of manufacturing fiberglas products. It was stated that, while in the process of manufacture, the materials are in a damp or moist state, eliminating the hazards of dust inhalation from that end. He was asked to make suggestions that would alleviate the conditions presently existing in handling their materials. Three members are known to be afflicted with asbestosis.

Brother Robert McCaffrey, delegate from Local No. 40, reports all members working with a few travelers employed in the territory. The new agreement, which goes into effect soon, includes an increase to $3.15 per hour for mechanics, 10 cents per hour to the health and welfare fund and five cents per hour towards a vacation fund.

Delegate Ernest Blair, Local No. 43, reports work at present good with future prospects the same. Total of 65 men working in territory including one traveler. Two local members are working outside the territory on traveling cards. Brother Blair discussed the non-Union conditions that persist in the Worchester area and was advised by General Secretary John W. Hoff. Ground has been broken for construction of a new atomic power plant to be built in Rowe, Mass.

Delegate Harry Herbst, Local No. 91, reports work at present very good with future prospects very good. A fifty-five million dollar atomic plant will soon be constructed at Indian River Peekskill beginning about November 1, 1956. Several future jobs will cost in the vicinity of from five to ten million dollars. The new agreement rates mechanics wages at $3.65 per hour retroactive to July 1, 1956; January 1, 1957 to June 1, 1957, $3.75; July 1, 1957 to December 30, 1957, $3.90; January 1, 1958 to June 30, 1958, $4 per hour.

Business Agent M. H. Nichols, Local No. 95, Toronto, Ontario, Canada, visiting at this conference, spoke at length about the expanding industrial conditions in his area. Their health authorities have classified the fibrous diseases as "pneumoconiosis." He was highly commended by Secretary-Treasurer Hoff on the fine work he has been doing in Canada.

General Secretary-Treasurer John W. Hoff and Vice President George Rider patiently advised the various delegates on their many problems which included the abrogation by the Sheet Metal Workers International of the agreement recently negotiated between our respective organizations, covering the interior duct lining and this subject matter is again the subject of consideration between committees representing the Sheet Metal Workers and our International Association.

The report that our General President C. W. Sickles (who was not with us at this meeting due to his attendance at the Southwest Conference meeting in Oklahoma City this date) is completely well after a rough summer is good news to all of us.

The volume of work reported on a national scale makes work prospects for the future look very good.

There being no further business before the conference, the meeting was adjourned at 1 p. m.

After adjournment all delegates were transported to the annual Clam Bake as the guests of Local No. 30.

Guests were greeted by the Local No. 30 committee consisting of Brother E. O'Brien, chairman and

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington 25, D. C. July 16, 1956

Mr. John W. Hoff, Gen. Secretary-Treasurer
International Association of Heat & Frost
Insulators & Asbestos Workers
505 Machinists' Building
1300 Connecticut Avenue
Washington 6, D. C.

Dear Mr. Hoff:

This will acknowledge receipt of compliance material submitted in accordance with the filing requirements of Section 9 (h) of the Labor Management Relations Act, 1947.

The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until December 31, 1956, and under Section 9 (h) until July 2, 1957, provided there are no intervening changes in your officers.

Our Regional and Subregional offices have been notified of your renewal of compliance.

This, of course, does not cover your local organizations. Each local must separately meet the above filing requirements of the Act in order to enjoy its benefits.

We will give you thirty days advance notice, whenever possible, of pending expiration of compliance as reflected by our records. We assume no responsibility for notification as it is your obligation to keep this material up to date.

Very truly yours,

Russel R. Miller

Russel R. Miller
Election Officer and
Affidavit Compliance Chief

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VOL. XIV JULY, 1957 NO. 2

THE Asbestos WORKER

DEFENDANT'S EXHIBIT 2

19TH INTERNATIONAL CONVENTION HEADQUARTERS

New Orleans, Louisiana • September 3-6, 1957

72-149

...power go on record as endorsing Safe Practice Code as today as also all of the present International Officers at non-union International Convention to be held in New Orleans in September of this year. Motion carried.

...to our General Office on the ...ion of Local No. 101, ...Yard Local ... ...ciation in this Conference was made and a committee of two were named to attend this Conference for the purpose of stating their case. Brothers Patrick J. Fagan and S. P. Metola of Local No. 101 attended. After discussing the merits of their case, President C. W. Sickles rose to state that the problems involved in a Shipyard local and those of a building trades local are so far apart that it would not be advisable or practical to accept the affiliation of a Shipyard Local with this Conference. The Conference did on motion duly seconded vote unanimously to refuse affiliation to Navy Yard Local Unions. Delegate Anderson stated his experiences with the membership of Local No. 08 Boston Naval Shipyard and will always be glad to honor their Traveling Cards whenever work in the area warrants it.

After hearing reports of the delegates and their statements of heavy work loads, present and future, the problem of manpower to properly service our trade was discussed. President Sickles stated that the importance of bringing our Improver ratio up to the legal status, as provided for in our International Constitution, is imperative at this time and instructed those locals that have not complied to do so.

The unpleasant situation that persists in the Worcester area was again brought to the attention of the Conference. President Sickles described it as a "cesspool area" and advised that he had already made tentative plans to visit Worcester and at that time meet with all interested in our craft problem in that area including the New England Local Union Business Agents which visit he expects to make in the early part of July and at that time every possible effort will be made to bring about a satisfactory adjustment of the situation which has for some time past existed in and around the Worcester, Mass., area.

The question of premium wages was discussed with its relative pros and cons. President Sickles enlightened the delegates as to its failures ... and stated that we have made but ... progress in the matter of ... ...ployed on the job. Complaints ... from the shops as to ... and from the job and instances ... discharging the ... that ... ...ensue. President Sickles stated that we must reckon this practice as it sets up a multiple classification of journeymen as opposed to our International Constitution.

> The problem of hazardous materials was again discussed with the importance of using preventative measures to eliminate inhalation, irritation, and possible infection stressed. It is suggested that, when working under dusty conditions, respirators should be used at all times and gloves whenever conditions warrant.

In reply to inquiry raised by delegates, President Sickles made a short reply in connection with the correspondence course which has been going around the country during the last two months, which correspondence initiated out of Local No. 5, and assured the Conference delegates that these communications, paragraph by paragraph, will be analyzed and answered at the proper time and place, namely, the next scheduled International Convention which will be held in New Orleans the first week in September.

The Conference goes on record as instructing those local delegates attending the International Convention at New Orleans to meet during Convention Week to discuss its problems.

Many of the delegates present inquired about Brother Abram Goldberg of Local No. 6 and they all wish him a speedy recovery from his present illness.

Successful culmination of the agreement between the Asbestos Workers International and the Sheet Metal Workers International Association was elaborated upon by President Sickles. The many setbacks and heartaches attendant upon the many meetings required for the formulation and conclusion of such an agreement are not generally understood by our membership. We are deeply grateful to our General President C. W. Sickles, General Secretary-Treasurer John W. Hoff and Vice President Hugh E. Mulligan for bringing this problem to a successful conclusion.

There being no further business ...

...

...

The Unladylike Behavior of Maria Mitchell

In a quiet house in Lynn, Massachusetts, in 1829, an old woman lay waiting for death. Well—she said in amused wonder—if she is dying, there is nothing very unpleasant about it. And she took about her one of the most remarkable of the many remarkable women America has produced.

How could it be, on a night very long ago, when as a Quaker girl in Nantucket Maria Mitchell discovered a comet—and got a gold medal worth 20 ducats from the Danish King.

Or even in the long years after that. But many people scoffed at the proper Nantucket women as a "bluestocking" community, regarded Maria as an unsexed one-phenomenon and her discovery as only an accident.

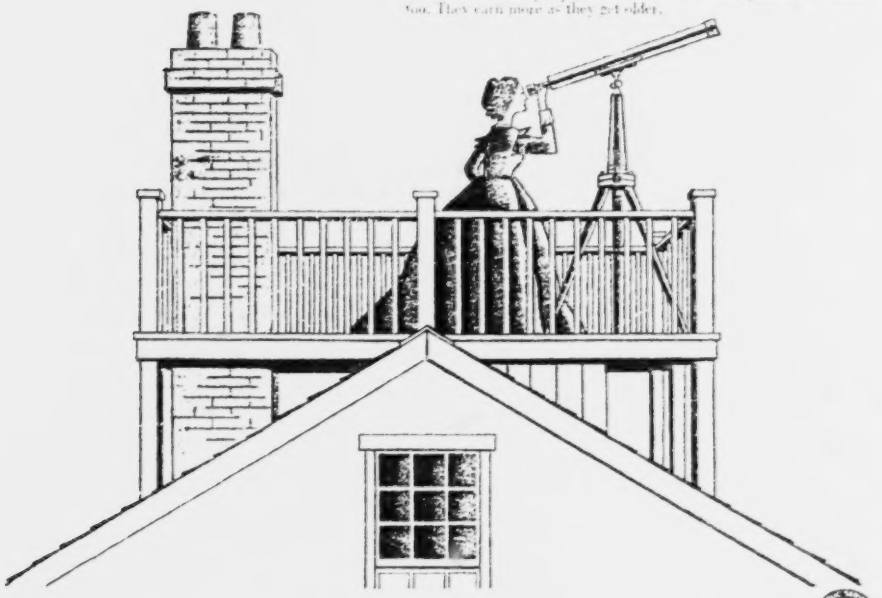
That was because they didn't know Maria Mitchell. At 12 she could negotiate a ship's chronometer; at 17 she understood the stars in "Practical Navigator" and was studying science in self-taught French, German and Latin. In time she would become the first woman member of the American Academy of Arts and Sciences, the first woman astronomy professor—in Matthew Vassar's Female College—and a member forever of New York University's Hall of Fame.

Moreover, all her adult life she was to work with growing success in the crusade to make American women free.

No one these days would question the rewards of Maria Mitchell's crusade. Women today enrich every level of public life. And in family life, they guard financial security two times out of three. One reason, probably, why them families have more than $[illegible] saved—in guaranteed-safe United States Savings Bonds.

Women know there is no *safer* way to save. Trust them. Through Payroll Savings or at your bank, start *your* Bond program, too. Today.

Now Savings Bonds are better than ever! Every Series E Bond purchased since February 1, 1967, pays 4½% interest when held to maturity. It earns higher interest in the early years than ever before and matures in only 8 years and 11 months. Hold your *old* E Bonds, too. They earn more as they get older.



PART OF EVERY AMERICAN'S SAVINGS BELONGS IN U.S. SAVINGS BONDS

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Asbestos

President's Page

(Continued from page 1)

other operating personnel:

"30.0% by bank cashiers;

"12.7% by bank managers;

"9.6% by bank presidents;

"6.0% by bank vice presidents."

The arithmetic says that in the year ending June 30, 1960, nearly one-third of the 1,771 banks suffering internal frauds were victimized by their own cashiers, 531 of them, and the cashier of a smaller bank is the trusted chief who runs the institution.

The arithmetic says that during this period approximately *152 bank presidents* embezzled or stole from their own banks.

Mr. Miller told the Arkansas and Ohio bankers that it is "not my purpose to frighten you." He also told Ohio bankers that if the "averages" stood up, "about 75 Ohio banks (20 Arkansas banks) will report violations to the FBI this year."

"It is not beyond the realm of reality," said Mr. Miller in his address, "to say that while some of you are sitting here listening to me an embezzlement may be taking place in your bank back home."

We think the public should know that an obscure clause in the Landrum-Griffin Act imposed very costly bonding expenses upon unions that are unjustified by experience.

The AFL-CIO believes that there is no justification for the continued imposition of exceptionally strict and expensive bonding requirements for trade union officers and employees—bonding prices that must be paid, inevitably from the union assets that could be used to promote the well-being of the union members.

The AFL-CIO believes it is entitled, on its record, to the ordinary commercial blanket bond acceptable under the law and under common practice for trustees and employees with a fiduciary responsibility in all other financial institutions.

If unions were allowed to develop in cooperation with the surety companies a schedule of rates for commercial blanket fidelity bonds—exactly the same kind of fidelity bonds now written for banks and other financial institutions—they could obtain greater coverage for a lesser rate, and the assets of the trade union movement would be conserved as they should be for the benefit of the members.

The normal commercial blanket bond is all that is needed for the protection of union monies—and we look forward to the day when the fine record of our officers in handling, investing and recording union finances is recognized in law.

Cancer Foundation Aims Outlined

The Eleanor Roosevelt Cancer Foundation is a national voluntary health organization devoted primarily to cancer research. It is the only organization in the country to which Mrs. Roosevelt has given the use of her name. She did so because of the distinctive contribution it makes in the fight against cancer. Its program is not duplicated by any other organization.

The twofold program of the foundation provides for:

1. Building new cancer research facilities at hospitals and medical schools in various parts of the country. These laboratories and institutes will be named for Eleanor Roosevelt.

2. Sponsoring an international fellowship program for cancer research and the training of advanced cancer research scientists both in this country and abroad.

Gen. Omar N. Bradley is chairman of the foundation's Board of Governors. Rep. James Roosevelt (D-Calif.) is president. Sidney Glazier is national executive director.

The Scientific Advisory Board of the foundation is headed by Dr. John R. Heller, president of the Memorial Sloan-Kettering Cancer Center, former director of the National Cancer Institute.

In order to extend its program and to outdoor on multiple appeals to the public the Eleanor Roosevelt Cancer Foundation has become affiliated with the American Cancer Society.

The following grants have already been authorized by the Eleanor Roosevelt Cancer Foundation:

1. To the Jefferson Medical Center in Philadelphia for an Eleanor Roosevelt cancer research facility.

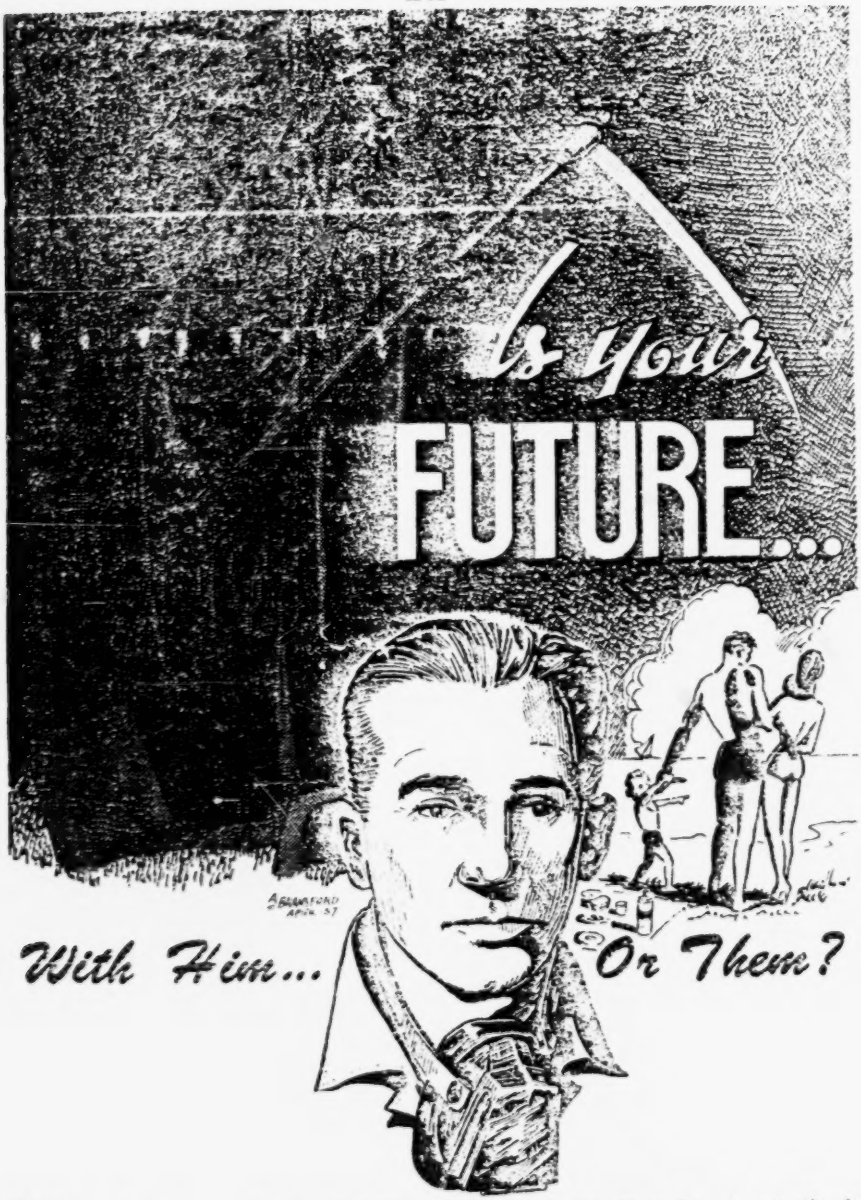
2. To the University of Utah Medical School for building a cancer research facility.

3. To the American Medical Center at Denver for cancer research and the care of cancer patients.

4. To the University of Colorado Medical Center for establishing an Eleanor Roosevelt Institute for Cancer Research.

5. To the International Union Against Cancer for an international fellowship program to spur advanced cancer research and training.

***WORLD HEALTH AWARD** to Gen. Omar N. Bradley (center), board chairman of the Eleanor Roosevelt Cancer Foundation, draws approving smiles from President Kennedy and Mrs. Roosevelt.*



Developed through efforts of Safety Superintendent A. H. Rinard of Long Beach Naval Shipyard and Business Agent Webster Ay of Local No. 20

LABOR'S OPPOSITION WILL
VOTE
NOV. 6
Will You

THE STATE OF TEXAS }
COUNTY OF JEFFERSON }

BEFORE ME, the undersigned authority, on this day personally appeared Geo A. Weller, who being first duly sworn, on oath states:

That there is presently pending in the United States District Court for the Eastern District of Texas, Beaumont Division, a total of nine (9) cases involving suits for damages against Petitioners and others based upon the theory of strict liability for exposure to asbestos dust. There is pending one (1) case in the United States District Court for the Southern District of Texas, Houston Division. There are eighteen (18) other cases pending in various United States District Court and State Courts.

GEO. A. WELLER
Geo. A. Weller

SWORN TO AND SUBSCRIBED BEFORE ME by the said Geo. A. Weller, to certify which witness my hand and seal of office this 12th day of July, A.D. 1974.

OUIDA L. SWOPE
Notary Public in and for
Jefferson County, Texas.

[SEAL]

Ouida L. Swope, Notary Public
In and for Jefferson County,
Texas

ASBESTOSIS LITIGATION

1. *Albert C. Baycroft* v. *Burlington Northern, Inc. et al*, United States District Court for Eastern District of Washington — Northern Division, Case No. 3879.

2. *John F. Burke* v. *Combustion Engineering, Inc. et al*, United States District Court for Northern District of Ohio – Eastern Division, Case No. C73-239.

3. *Francis A. Ceas* v. *Johns-Manville Industrial Insulations*, Circuit Court of Cook County, Illinois, Case No. 72-5843.

4. *Claude A. Dunn* v. *Johns-Manville International Corp. et al*, United States District Court for Southern District of Texas — Houston Division, Case No. 73-H-1072.

5. *Mary E. Glaser* v. *Johns-Manville Products Corp. of Mass.*, Commonwealth of Massachusetts, Middlesex, SS — Superior Court.

6. *Alfreda J. Goodman* v. *Johns-Manville Corporation et al*, Circuit Court of Missouri, Sixteenth Judicial Circuit, Case No. 765,916 — Division 13.

7. *Floyd Gustafson* v. *Fibreboard Paper Products Corp. et al*, United States District Court for District of Minnesota — Fifth Division, Case No. 5-71-40.

8. *Virgil Harrod* v. *Johns-Manville Sales Corp. et al*, United States District Court for the District of Kansas, Case No. KC-3412.

9. *Mary Kathryn Janesko* v. *Johns-Manville Corporation, et al*, District Court of Wyandotte County, Kansas, Case No. 48110B.

10. *John A. Karjala* v. *Fibreboard Paper Products Corp. et al*, United States District Court for the District of Minnesota — Fifth Division, Case No. 5-71-18.

11. *Mary C. Kearns* v. *Combustion Engineering, Inc. et al*, United States District Court for Northern District of Ohio — Eastern Division, Case No. C73-70.

12. *The Louisville Trust Co.* v. *Ohio Farmers Insurance Co. et al*, Jefferson Circuit Court — Common Pleas Branch — Seventh Division, Case No. 164922.

13. *Elmer J. Measor* v. *Combustion Engineering, Inc. et al*, United States District Court for Northern District of Ohio — Eastern Division, Case No. C73-238.

14. *Mary Muntean* v. *Combustion Engineering, Inc. et al*, United States District Court for Northern District of Ohio — Eastern Division, Case No. C73-199.

15. *Robert Pollock & Carol Pollock* v. *Johns-Manville Sales Corp. et al*, Court of Common Pleas, Cuyanoga County, Ohio, Case No. 923,247.

16. *Rose Ann Ricci* v. *Combustion Engineering et al*, United States District Court for Northern District of Ohio — Eastern Division, Case No. C72-507.

17. *Evelyn Roderman* v. *Combustion Engineering et al*, United States District Court for Northern District of Ohio — Eastern Division, Case No. C72-390.

18. *Betty Sedlock* v. *Combustion Engineering, Inc. et al*, United States District Court for Northern District of Ohio — Eastern Division, Case No. C72-395.

19. *Harold J. Thompson, Jr., a Minor* v. *Johns-Manville Corp. et al*, Circuit Court of Missouri, Sixteenth Judicial Circuit, Case No. 775555 — Division 14.

ASBESTOSIS CASES CURRENTLY PENDING

Bruce D. Bell v. *Fibreboard Corporation, et al* — Civil action No. B-74-50-CA, U. S. District Court, Beaumont Division — Attorney for plaintiff, George Sladczky, Jr. — Date opened 2/20/74.

Hilda Broussard v. *Fibreboard Corporation, et al* — Civil action No. B-73-CA-300, U. S. District Court, Beaumont Division — Attorney for plaintiff, Marlin Thompson — Opened 12/12/73.

Claude A. Dunn v. *Johns-Manville International Corporation, et al,* (Fibreboard Corp. our client) — Civil action No. 73-H-1072 — U. S. District Court for Southern District of Texas, Houston Division — Attorney for plaintiff, Joe Jamail — Opened 9/6/73.

J. J. Crawford v. *Fibreboard Paper Products Corporation, et al*— Civil action No. 6492, U. S. District Court, Beaumont Division — Attorney for plaintiff, Marlin Thompson — Opened 12/9/69.

Thomas S. Hartwell v. *Johns-Manville Products Corporation, et al,* v. *Fibreboard Paper Products Corporation, et al* (Third-party defendant) — No. 7513 — U. S. District Court, Beaumont Division — Attorney for plaintiff, Ward Stephenson — Opened 4/17/72.

Hattie Bell Johnson, et al v *.Fibreboard Corporation, et al* Civil action No. B-74-124-CA, U. S. District Court, Beaumont Division—Attorney for plaintiff, Gilbert T. Adams, Jr. — Opened 5/16/74 (I. C. Johnson deceased).

Eunice LaGrappe, et al v. *Fibreboard Corporation, et al* — Civil action No. B-74-66-CA — U. S. District Court, Beaumont Division — Attorney for plaintiff, Marlin Thompson — Opened 3/6/74) (Mr. LaGrappe is now deceased).

Elizabeth Matthews, et al v. *Fibreboard Corporation, et al* — Civil action No. B-73-CA-309 — U. S. District Court, Beaumont Division — Attorney for plaintiff, Marlin Thompson — Opened 10/16/73 (Mr. Matthews is now deceased).

Beuana Mae McDaniel, widow of George W. McDaniel, deceased, v. *Fibreboard Corporation, et al* — Civil action No. 6967, U. S. District Court, Beaumont Division (our clients are Fibreboard and Ryder Industries) — Attorney for plaintiff, Marlin Thompson — Opened 9/9/70.

David A. Spell v. *Fibreboard Corporation, et al* — No. B-74-81-CA — U. S. District Court, Beaumont Division — Attorney for plaintiff, Marlin Thompson — Opened 3/25/74.

PITTSBURGH COCA-COLA BOTTLING WORKS VS. PONDER,

Supreme Court of Texas, 1969,

443 SW.2d 546

Suit against bottler for personal injuries sustained as result of alleged explosion of bottle distributed by bottler. The District Court, Morris County, Rolston, J., entered judgment for plaintiff and defendant bottler appealed. The Texarkana Court of Civil Appeals, Davis, J., 430 S.W.2d 104, affirmed, and defendant brought error. The Supreme Court, Calvert, C. J., held that special issue submitted to jury asking whether bottle and its contents were not reasonably fit for purposes for which they were intended without securing finding that bottle was not reasonably fit at crucial time of delivery by bottler would not support judgment in favor of plaintiff on basis of strict liability.

Judgments reversed and cause remanded.

1. Torts ➤➤ 14.1

Rule of strict liability for injuries from defective products would be applied to bottlers.

2. Torts ➤➤ 27

Prime requirement for imposing liability on a seller under rule of strict liability is proof by plaintiff that he was injured because of a defective condition in product when it left hands of particular seller and such proof of defect may be made by circumstantial evidence.

3. Torts ➤➤ 27

Evidence would support inference that exploded bottle was not mishandled or damaged after it had been delivered to plaintiff by bottler and thus was defective when delivered so as to support verdict on theory of strict liability in favor of injured plaintiff who testified that the six deliverymen of bottled drinks had separate areas in which to store their bottled drinks and that she was only one who transferred bottled drinks from storeroom to cooler and that her employees did not go into storeroom except to take empties and had no occasion to touch full cases.

4. Trial ➤➤ 350(4)

Special issue submitted to jury in suit to recover for injuries from exploded bottle asking whether bottle and its contents were not reasonably fit for purposes for which they were intended without securing finding that bottle was not reasonably fit at crucial time of delivery by bottler would not support judgment in favor of plaintiff on basis of strict liability.

5. Trial ➤➤215

Absent necessity for special instruction to enable jury to pass on and render verdict on issues of strict liability in favor of plaintiff for injuries received from exploded bottle, giving of instruction was error. Rules of Civil Procedure, rule 277.

6. Trial ➤➤352(5)

Special issue submitted to jury in connection with plaintiff's theory of res ipsa loquitur for recovery from exploded bottle requiring jury to find in order to give affirmative answer that there was an explosion of bottle and that explosion was caused by bottler's negligence was improper in being duplicitous by containing two or more controverted issues of fact.

7. Trial ➤➤215

Instruction to jury advising that if certain facts were found to exist jury should answer special issue in affirmative was an improper giving of general charge. Rules of Civil Procedure, rule 277.

Jackson, Walker, Winstead, Cantwell & Miller, W. B. Patterson and Jack Pew, Jr., Dallas, for petitioner.

Jones, Jones & Baldwin, Doyle Curry, Marshall, Boyet Stevens, Daingerfield, for respondent.

CALVERT, Chief Justice.

Mrs. Cuma Ponder, respondent, brought suit against petitioner, Pittsburg Coca-Cola Bottling Works of Pittsburg, Texas, for personal injuries sustained as a result of an alleged explosion of a "coke" bottle distributed by petitioner. Based upon answers by the jury to special issues,

the trial court entered judgment for Mrs. Ponder in the amount of $11,500. The court of civil appeals affirmed. 430 S.W.2d 104. We reverse the judgments of the courts below and remand the cause to the trial court.

Respondent operated a cafe in Omaha, Texas. She received her supply of Coca-Cola directly from petitioner. She kept the wooden cases in a small storeroom along with five other brands of soft drinks. She testified that on September 27, 1965, she was carrying three "king size cokes" from the storeroom to the cooler behind the counter and, as she prepared to put them in the cooler, one of them exploded, injuring her left knee, leg, and ankle.

Respondent pleaded two distinct grounds of recovery, negligence under the doctrine of res ipsa loquitur, and strict liability. In response to special issues, the jury found that (1) the bottle in question was not reasonably fit for the purposes for which it was intended to be used; (2) this unfitness was a proximate cause of respondent's injuries; (3) the explosion of the bottle resulted from petitioner's negligence; and (4) this negligence was a proximate cause of respondent's injuries. Petitioner's first two points of error assert that there is in the record no evidence of probative value to support a recovery by respondent on either of her two theories. More specifically, petitioner argues that there is no evidence that the explosion was caused by a defect which existed in the bottle when it left the care, custody and control of petitioner. Evaluation of these points requires an understanding of applicable law and an analysis of the evidence.

Res ispa loquitur is a rule of evidence which permits a jury to infer negligence, without proof of specific negligent conduct on the part of the defendant, if the accident is of a type which does not ordinarily occur in the absence of

negligence and if the instrumentality inflicting the harm is within the exclusive control of the defendant. Wichita Falls Traction Co. v. Elliott, 125 Tex. 248, 81 S.W.2d 659 (1935); Washington v. M. K. & T. Ry. Co., 90 Tex. 314, 38 S.W. 764 (1897). This court has extended the res ipsa loquitur doctrine to exploding bottle cases, even in situations where the bottle has passed from the exclusive control of the bottler at the time of injury, provided the plaintiff proves "that the bottle (1) was in no way 'accessible to extraneous harmful forces'; and (2) 'was carefully handled by plaintiff or any third person who may have moved or touched it.'" Hankins v. Coca Cola Bottling Co., 151 Tex. 303, 249 S.W. 2d 1008 (1952); Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968, 160 A.L.R. 1445 (1944). In *Honea*, in dealing with the quantum of proof required to discharge the plaintiff's burden in such cases, we quoted from Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, as follows:

> "It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it. * * * If such evidence is presented, the question becomes one for the trier of fact * * *, and, accordingly, the issue should be submitted to the jury under proper instructions." See 183 S.W.2d 970.

See also Benkendorfer v. Garrett, 143 S.W.2d 102, at 1023-1024 (Tex.Civ.App.—San Antonio, 1940, writ dism'd).

This court has not heretofore applied the rule of strict liability in exploding bottle cases. Indeed, our approach to use of the rule for imposing liability on sellers of products

has been gradualistic and marked with caution. Some twenty-seven years ago, we adopted the rule as a means of fixing liability on manufacturers and packagers of food products for human consumption, Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942), and on retail purveyors thereof, Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835, 142 A.L.R. 1424 (1942); but a decade later, we questioned the wisdom of applying the rule to retailers of food products, canned or packaged by others, and we refused to apply it to wholesalers of such products. Bowman Biscuit Co. of Texas v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952). Then, in 1956, with the question squarely presented, we refused to grant a writ in Brown v. Howard, 285 S.W.2d 752 (Tex.Civ.App.—San Antonio, 1956, writ ref'd. n. r. e.), and thus refused to apply the rule to a manufacturer of a spray causing harm when used on the plaintiff's cattle.

[1] In 1967, we finally yielded to the irrefutable logic that the rule of strict liability is the only practical vehicle for protecting the public against harm so often encountered by innocent users and consumers of defective products. We abruptly changed direction. In McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex.Sup. 1967), we applied the rule against a distributor of a permanent wave lotion which proved harmful when applied to a woman's hair and scalp. In that case, we committed the court to the rule of strict liability expressed in Section 402A of The American Law Institute's Restatement of the Law of Torts (2d Ed.) as applicable to all persons engaged in the business of selling who sell a product in a defective condition which renders it unreasonably dangerous to a user or consumer or to his property. The necessary effect of *McKisson* was to disapprove prior contrary expressions of the law as announced in Bowman Biscuit Co. v. Hines, supra, and Brown v.

Howard, supra. Thereafter, we expressly disapproved Brown v. Howard, and approved a holding of a court of civil appeals that a seller of a defective product is "subject to strict liability for damage caused to the property of the ultimate consumer." Franklin Serum Co. v. C. A. Hoover & Sons, 418 S.W.2d 482 (Tex.Sup.1967). More recently, we have extended the rule to sellers of defective products which cause harm to non-users and non-consumers. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex.1969). We perceive no sound reason why the rule should not be applied to bottlers.

[2] The prime requirement for imposing liability on a seller under the rule of strict liability is proof by the plaintiff that he was injured because of a defective condition in the product when it left the hands of the particular seller. Jack Roach-Bissonet, Inc. v. Puskar, 417 S.W.2d 262, at 278 (Tex.Sup.1967). This is not to say that proof of the defect must be made by direct or opinion evidence; it usually can only be made by circumstantial evidence. As an example, see Darryl v. Ford Motor Co., supra.

While the theories of liability predicated upon res ipsa loquitur and strict liability are different, the problems of making proof confronting plaintiffs who seek to impose liability under the differing theories are quite similar. In an article in 23 Sw.L.J. 1, Dean Page Keeton University of Texas School of Law, states:

> "When seeking a recovery on a theory that a product was defective when sold by the defendant, plaintiff has substantially the same proof problems for recovering on a theory of strict liability as he does on a theory of negligence. Under both theories plaintiff must establish to the satisfaction of a jury a defect at the time of sale. Once the proof is sufficient to get to the

> jury on the existence of a defect, there is generally a basis for an inference of negligence."

Dean Keeton, in writing on exploding bottle cases, recognizes that two factors of importance in determining whether a plaintiff in a particular case has established a prima facie case are "the length of time between surrender of possession by defendant and the breakage" and "the number of persons who could have had access to the bottle during that time." Keeton, Products Liability — Problems Pertaining to Proof of Negligence, 19 Sw.L.J. 26.39. The evidence on these two factors was obviously controlling in Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944), in which we held that the plaintiff's evidence made a prima facie case, and in Hankins v. Coca Cola Bottling Co., 151 Tex. 303, 249 S.W.2d 1008 (1952), in which we held that the plaintiff's evidence did not make a prima facie case. In the first case, there was evidence that the bottle which exploded had been out of the hands of the bottler for only some five or ten minutes, that it had undergone no change during the interval, and that the plaintiff was exercising some care in handling it. In the latter case, the bottle which exploded had been out of the hands of the bottler for at least twenty-four hours during which time it had been in a retail store where it was subject to almost constant handling by customers before being sold to the injured plaintiff. We held that the plaintiff's evidence "did not satisfy the controlling requirement that he negative the possibility of an intermediate actor or the agency causing the injury, by a preponderance of the evidence, so as to allow the jury to decide whether negligence on the part of the Coca Cola Company might be inferred."

We turn now to an examination of the evidence in this case. There can be no question but that there is in the

record evidence of probative force that the bottle exploded and that respondent was injured by the flying glass. In addition to her own testimony to that effect, a regular customer, who was in the cafe at the time, testified that he heard what sounded like a shotgun, and that a piece of glass was propelled into his boot. The same evidence will support a reasonable inference that the bottle was defective when respondent removed it from the case in the storeroom to carry it to the cooler. The question remaining is whether the evidence will support a reasonable inference that the bottle did not sustain damage while in the storeroom, and thus that it must have contained the defect causing the explosion when it was placed in the storeroom by petitioner's deliveryman. Respondent relies entirely upon her own testimony to raise this inference.

It is undisputed that the bottle had been in the storeroom for at least four days before the day of its explosion. However, according to the testimony of respondent, the only persons, other than herself, who ever entered the storeroom were five other deliverymen of bottled drinks and her two employees. She testified further that all of the six deliverymen had separate areas in the storeroom in which to stack their cases of bottled drinks, and none ever placed his cases on the wrong stack; that if any cases were ever found in the wrong stack, it was because she put them there, and, in so doing, she handled them with care; that she alone transferred bottled drinks from the storeroom to the cooler, which she did with care, and her employees did not go into the storeroom except to take the empties and that they had no occasion to touch the full cases.

[3] We hold that the respondent's testimony will support a reasonable inference that the exploded Coca Cola bottle was not mishandled or damaged after it had been

delivered to her by petitioner, and thus that the bottle was defective when delivered. To hold otherwise would be to invade the province of the jury and determine the credibility of respondent as a witness. We see no need to analyze the many in-state and out-of-state cases cited in the briefs of the parties. All involve facts which differ in some degree from the facts in this case.

Petitioner's second contention, presented in a series of points of error, is that the special issues and instructions submitting strict liability and res ipsa loquitur to the jury were erroneous and the errors in them were so prejudicial to the defendant that they caused the rendition of an improper judgment. We sustain this contention. The two issues and instructions which submitted strict liability are as follows:

"Special Issue No. 1:

"Do you find from a preponderance of the evidence that the Coca Cola bottle and its contents in question was not reasonably fit for the purposes for which it was intended to be used?

ANSWER 'It was not reasonably fit' or 'It was reasonably fit'.

"If you have answered the foregoing Special Issue No. 1 'It was not reasonably fit' and only in that event, then answer the following Special Issue, otherwise, do not answer same.

"Special Issue No. 2:

"Do you find from a preponderance of the evidence that such unfitness, if any, you have found in answer to the preceding Special Issue, was a proximate cause of the Plaintiff's injuries, if any, in question?

"ANSWER 'Yes' or 'No.'

"You are instructed in connection with the foregoing Special Issues that an implied warranty, not based on an express warranty or the doctrine of negligence, is imposed upon a bottler if its product is for human consumption or calculated to be used in close proximity to the human body and that by bottling, assembling and marketing such product, the bottler impliedly warrants that the product is reasonably fit for the use that such product is intended to be put.

"You are further instructed that one who puts out as his own product and assembles components thereof that may be manufactured by others may yet be liable for defects in said product just as though the bottler and assembler were the manufacturer of all the components."

[4, 5] Petitioner objected to Special Issue No. 1 because it was "not confined to the time the bottle left the care, custody, and control of the Defendant, and the answer by the jury will [would] not be any indication to the Court as to whether the jury found it to be unfit at the time it left the Defendant's care, custody, and control, or whether it was unfit at the time the bottle broke." The issue, as worded, was clearly subject to the objection made, and the jury's answer, "It was not reasonably fit", will not support a judgment based on strict liability because respondent has not secured a jury finding that the bottle was not reasonably fit at the crucial time of delivery to respondent. Inasmuch as the cause is to be remanded for retrial, we add at this point that the "instruction" given by the trial court in connection with Special Issues Nos. 1 and 2 constitutes a general charge on the law which is not only completely unnecessary to an undertanding of the issues but is also repugnant to our special issue practice. Rule 277, Texas Rules of Civil Procedure, authorizes a special instruction only when it is necessary "to enable the jury

to properly pass upon and render a verdict on such issues." Boaz v. White's Auto Sores, 141 Tex. 366, 172 S.W.2d 481 (1943). There was no such necessity here. See also Lindley v. Lindley, 384 S.W.2d 676 (Tex. Sup. 1964).

Since the jury's answers to the strict liability issues will not support the judgment in favor of respondent, it is necessary to examine the issues submitting res ipsa loquitur to determine if they will support the judgment. The issues and an accompanying instruction are as follows:

"Special Issue No. 3:

"Do you find from a preponderance of the evidence that the explosion in question, if any, of the Coca Cola bottle and its contents resulted from the negligence, if any, of the Defendant?

"ANSWER 'Yes' or 'No.'

"If you have answered the foregoing Special Issue No. 3 'Yes,' and only in that event, then answer the following Special Issue, otherwise, do not answer same.

"Special Issue No. 4:

"Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the occurrence in question?

"ANSWER 'Yes' or 'No.'

"In connection with the foregoing Special Issues No. 3 and 4, you are instructed that if the explosion, if any, was part of an occurrence as would not ordinarily happen without fault on the part of the Defendant prior to and at the time of delivery of the Coca Cola bottle and its contents in question to the Plaintiff, and that the Coca Cola bottle and its contents was handled with due care after such delivery, and that the Coca Cola bottle and its contents was not altered or changed in any way after such delivery and up to the time of

any explosion, then you may find that the explosion, if any, was caused by negligence, if any, of the Defendant under the doctrine of 'res ipsa loquitur' or 'the event or thing speaks for itself.' Further, this doctrine of 'res ipsa loquitur' rests upon the proposition that such an explosion, if any, must be such as in the ordinary course of events and things does not happen without negligence, if any, on the part of the one having the exclusive management or control of the bottling and delivery process."

[6, 7] Among numerous objections lodged by petitioner to issues 3 and 4 and the accompanying instruction was one that special issue 3 was duplicitous in that it contained two or more controverted issues of fact. The objection should have been sustained. To give an affirmative answer to the issue, the jury had to find that there was an explosion of the Coca Cola bottle and that the explosion was caused by petitioner's negligence. Moreover, the instruction given in connection with issues 3 and 4 is an even more flagrant violation of the rule against the giving of a general charge than is the instruction given in connection with issues 1 and 2. In the instruction, the court plainly advised the jury that, if certain facts were found to exist, the jury should answer issue No. 3 that the explosion of the bottle was caused by petitioner's negligence. The judgment in favor of respondent cannot be permitted to stand on the jury's answers to Special Issues Nos. 3 and 4.

We recognize that the framing of special issues for submitting a case to a jury on res ipsa loquitur pleading and proof may present problems not found in cases based upon specific negligent acts, Morris, Res Ipsa Loquitur in Texas, 26 Texas, L.Rev. 257, 761 (1948); 36 Texas L.Rev. 696 (1958); but this fact does not authorize a general charge form of submission over the objection of one of the parties.

In view of our holding that the rule of strict liability is applicable to bottler defendants in this type of case, there would seem to be little, if any, advantage to plaintiffs injured by exploding bottles to continue to plead and submit their cases on res ipsa loquitur.

The judgments of the court of civil appeals and trial court are reversed and the cause is remanded to the trial court.

HOWLE vs. CAMP AMON CARTER, ET AL.

Supreme Court of Texas, 1971,

470 SW(2d) 629

Suit was brought in which it was alleged that injuries and damage sustained by plaintiff were proximately caused by negligence of camp employees. The District Court No. 141, Tarrant County, James E. Wright, J., sustained motion for summary judgment of camp and its operator on ground of charitable immunity, and review was sought. The Fort Worth Court of Civil Appeals, Second Supreme Judicial District, Brewster, J., 462 S.W.2d 624, affirmed, and review was sought. The Supreme Court, Walker, J., held that with respect to causes of action arising from events occurring after March 9, 1966, a charitable enterprise is subject to vicarious liability under rule of respondeat superior applicable to business organizations operating for profit.

Judgments reversed and cause remanded.

Pope, J., dissented and filed opinion.

Charities ▸▸ 45(2)

With respect to causes of action arising from events occurring after March 9, 1966, a charitable enterprise is subject to vicarious liability under rule of respondeat superior applicable to business organizations operated for profit.

Scarborough, Black, Tarpley & Scarborough, Abilene, Wilson, Berry & Jorgenson, Dallas, Byrd, Davis, Eisenberg & Clark, Bob Roberts, Austin, for petitioner.

Strasburger, Price, Kelton, Martin & Unis, Royal H. Brin, Jr., Dallas, for respondents.

WALKER, Justice.

The defense urged in this case is charitable immunity, which has heretofore been recognized to a limited extent in Texas as an exception to the rule of respondeat superior. See Watkins v. Southcrest Baptist Church, Tex., 399 S.W.2d 530. We hold that, with respect to causes of action arising from events occurring after the motion for rehearing in *Watkins* was overruled, a charitable enterprise is subject to vicarious liability under the rule of respondeat superior applicable to business organizations operated for profit.

While attending Camp Amon Carter, an establishment operated by the Young Men's Christian Association of Fort Worth, Johnny Howle was struck in the eye by a sinker or hook attached to a fishing line cast by a fellow camper, Gary Post. As a result of this accident, which occurred in 1967, Johnny lost the sight of one eye. Suit was brought by John W. Howle, individually and as next friend for Johnny, against Gary Post, Camp Amon Carter, and the Y.M.C.A. It was alleged, among other things, that the injuries and damage sustained by the negligence of camp employees in failing to supervise Gary properly and prevent his casting in the area where he was casting. After severing the cause of action asserted against Gary, the trial court sustained the motion for summary judgment of Camp Amon Carter and the Y.M.C.A. on the ground of charitable immunity. The Court of Civil Appeals affirmed. 462 S.W.2d 624.

The several opinions in *Watkins* gave ample notice that the doctrine of charitable immunity would be reconsidered and might well be abrogated. It is now completely abro-

gated with respect to causes of action arising from events occurring after the motion for rehearing in *Watkins* was overruled on March 9, 1966.

The judgments of the courts below are reversed, and the cause is remanded to the district court.

POPE, Justice (dissenting).

I respectfully dissent. It is my opinion that the question of immunity on the part of certain described charitable institutions is a policy matter which can be better resolved by the Legislature. Courts, unlike the Legislature, are not structed to hear public witnesses on issues of policy. Courts, unlike the Legislature, are incapable of detailing the limitations which often accompany changes in policy. Following our decision in Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 (Tex. 1966), the Legislature in May, 1967, authorized a committee to study the problem of charitable immunity. Texas Laws 1967, House Concurrent Resolution No. 54 at p. 2883. The absence of any further action by the Legislature is subject to differing meanings, but among them is the idea that the Legislature was not impressed with the desirability of abolishing the doctrine which exempts from liability charitable institutons, such as hospitals, schools, churches, and orphanages.

Immunity from tort liability is a subject to which the Legislature has very recently addressed its attention. The 61st Legislature in 1969 enacted the Tort Claims Act which became effective on January 1, 1970.[1] I, therefore, find little merit in the suggestion that the Legislature failed to abolish charitable immunity because it probably was of the opinion that the judiciary should tend to that job. If

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[1] Statutory references herein are to Art. 6252-19, Vernon's Ann. T.C.S., known as the Texas Tort Claims Act.

the Legislature considered charitable immunity a judicial problem, one may wonder why it did not feel the same way about governmental immunity.

The fact is that the Legislature has already acted and did not wait for the judiciary to act on the subject of governmental immunity. Significantly, the Tort Claims Act preserves about as much governmental immunity as it waived. The act permits recovery for money damages for personal injuries or death but not for damages to property. The Act limited liability to $100,000 per person and $300,000 for any single occurrence. It does not allow recovery of punitive damages. Immunity from suit was not waived as to all classes of torts. The Act limits recovery to damages "arising from the operation or use of a motor-driven vehicle and motor-driven equipment * * *." The Act then states that even that terminology will not include motor-driven equipment used for the operation of floodgates or water release equipment by river authorities. Section 14 of the Act contains exactly one dozen exemptions from liability. Section 19A of the Act says that the Act does not apply to school districts except as to motor vehicles.

I find this method and technique on the part of the Legislature in dealing with a kindred immunity doctrine highly significant. Since the Legislature has not been hesistant in attacking the problem of governmental immunity from tort liability, and since it has been rather careful in specifying what immunity has been waived and what has not, I consider it presumptuous of this court to act as it has in the area of charitable immunity.

The undesirable consequences of the majority's action in totally abolishing the doctrine of charitable immunity can best be illustrated by an examination of the inconsistencies which this holding will necessarily create. For example, a

public school's liability caused by motor vehicles. The charitable educational institution benefits from no such limitation, nor could such a limitation be properly created by the judiciary. Nor does the charitable institution benefit, as does the public facility, from monetary ceilings on liability or from continued immunity from punitive damages. The sum of these inconsistencies is that the charitable institution, which performs no less a public service than its governmental counterpart, now faces unlimited exposure to a judgment of catastrophic proportions, while a public school or college remains rather well protected by legislation. In my opinion, this is not a desirable situation.

The same inconsistencies are apparent when dealing with medical facilities. For example, Section 18 of the Tort Claims Act provides that the term "motor driven equipment" shall not be construed to include medical equipment such as, but not limited to, iron lungs located in hospitals. We, therefore, are presented with a situation where the governmental hospital continues to benefit from its immunity, while the charitable hospital stands totally unprotected.

I find much merit in the arguments for limiting charitable immunity. My concern is that we are now disrupting an area of the law that the Legislature has already entered. The Legislature rather carefully avoided an overkill of the doctrine of governmental immunity. This court's opinion does not accomplish that result in its abrogation of charitable immunity. I would leave to the Legislature the task of completing what it has begun. Such action would afford greater harmony and more equal treatment among comparable instiutions.

The trial judge defined "negligence" as the failure to use ordinary care. "Ordinary care" was defined, "• • •

as applied to the minor plaintiff, Ray Munsinger, *means such care as an ordinarily prudent child* of the age, intelligence, experience, and capacity of the said Ray Munsinger would have exercised under the same or similar circumstance." (Emphasis mine.)

The effect of the jury findings on the issues of negligence and proximate cause is that Ray Munsinger did not exercise the care of a child of his age in his actions and conduct in handling and dealing with the liquid in the can. This being true, I just cannot agree that Ray should be excused from his own negligence and permitted to recover. I do not understand that a manufacturer, distributor, or retailer of any product can be charged with foreseeing any one in his right mind would fail to use ordinary care in his actions and conduct toward, or with, such product. Surely, a manufacturer, distributor or retailer is not to be mulcted in damages for the one and only reason that he put the product in circulation.

The ordinarily prudent child [person] is a well recognized test for measuring conduct of others in practically all cases, therefore, I cannot agree it should not be the test in a strict liability case.

The rule announced by the majority opinion is the minority rule in the United States. The quotation from Dean Prosser set out in the majority shows this to be true. Read the following language from such quotation:

> "There has been ostensible, and quite superficial, disagreement over whether contributory negligence is available as a defense where the action is one for breach of warranty. *A few decisions* have said flatly that it is not. *The greater number* have said quite as flatly that it is." (Emphasis mine.)

Then Dean Prosser sets out what he considers good reason for reconciling the conflict in favor of the "few decisions."

I do not agree and prefer the rule followed by the "greater number."

McKisson vs. Sales Affiliates, Inc.

Supreme Court of Texas, 1967,

416 SW(2d) 787

Products liability case against distributor for injuries sustained by plaintiff's wife from use of permanent wave preparation obtained by wife from salesman of local beauty supply company. The 108th District Court, Potter County, Mary Lou Robinson, J., rendered judgment for plaintiff and distributor appealed. The Court of Civil Appeals, 408 S.W.2d 124, reversed and rendered judgment for distributor, and error was brought. The Supreme Court, Norvell, J., held that even if plaintiff's wife who owned a beauty shop and who had received from distributor's salesman a sample of its permanent wave preparation should have known that preparation, which carried a label stating that it was for normal hair, could not safely be applied to bleached hair, and even if she were negligent in directing one of her employees to apply the preparation to her hair, evidence authorizing findings that the preparation was not reasonably fit for use of giving permanent waves and that her attempted use of preparation was proximate cause of her loss of hair established case of strict tort liability, and plaintiff could recover notwithstanding wife's contributory negligence.

Judgment of Court of Civil Appeals reversed and judgment of trial court affirmed.

Griffin, J., dissented.

1. **Sales ➤ 427**

Liability for physical harm caused by a defective product can be based upon an implied warranty of suitableness.

2. **Torts ➤ 18**

Contributory negligence of plaintiff is not a defense to an action based upon strict liability when such negligence consists merely of failure to discover the defect in the product, or to guard against the possibility of its existence.

3. **Torts ➤ 14.1**

Strict liability in tort lies against a distributor as well as a manufacturer.

4. **Torts ➤ 21**

One who delivers an advertising sample to another with the expectation of profiting therefrom through future sales is in the same position as to liablity for injuries resulting from use of product as one who sells the product.

5. **Torts ➤ 27**

Evidence supported findings that wave lotion, was not reasonably fit for use of giving permanent waves and that beauty shop operator's attempted use of lotion was the proximate cause of her loss of hair and burns.

6. **Torts ➤ 27**

When it is shown that the defective product came in a sealed container, it is inferable that the product reached injured consumer without substantial change in the condition in which it was sold.

7. Torts ⇻ 18, 27

Even if beauty shop operator who had received from distributor's salesman a sample of its permanent wave preparation should have known that the preparation which carried a label stating that it was for normal hair, could not safely be applied to bleached hair, and even if she were negligent in directing one of her employees to apply the preparation was not reasonably fit for use of giving permanent waves and that her attempted use of preparation was proximate cause of her loss of hair established case of strict tort liability, and contributory negligence would not preclude recovery from distributor.

Merchant & Barfield, Wayne B. Barfield, Amarillo, W. James Kronzer, Houston, for petitioner.

Simpson, Adkins, Fullingim & Hankins, John D. Curtis, Amarillo, for respondent.

NORVELL, Justice.

Section 402A of the American Law Institute's Restatement of the Law of Torts (2d Ed.), hereinafter referred to as the Torts Restatement, reads as follows:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although

"(a) the seller has exercised all possible care in the preparation and sale of his product, and

"(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

[1] Insofar as foodstuffs for human consumption are concerned, this section states the law as followed in Texas. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942). We are further of the opinion that as a logical proposition, the rule stated in *Decker* should be held applicable to defective products which cause physical harm to persons. As pointed out by the concurring justice in the Court of Civil Appeals, no sound distinction can be drawn between the use of an eye-wash solution that impairs or destroys vision and a foodstuff which causes illness. (408 S.W.2d 124, 1. c. 128).[1]

In Comment (a) under Section 402A of the Torts Restatement, it is said:

"This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. * * * The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground

[1] Other cases contain similar expressions, such as, [W]e see no rational doctrinal difference to justify any distinction between an upset stomach caused by a fly in a coke and a broken leg caused by a weak axle of a wheel chair". Putman v. Erie City Manufacturing Company, 338 F.2d 911 (5th Cir. 1964). See also, Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

of negligence of the seller, where such negligence can be proved."

In *Decker*, this court said:

"While a right of action in such a case is said to spring from a 'warranty,' it should be noted that the warranty here referred to is not the more modern contractual warranty, but is an obligation imposed by law to protect public health. According to Prof. Williston the law of warranty is older by a century than the action of special assumpsit, from which the modern law of contracts developed. 1 Williston on Sales, p. 368, § 195; Jeanblanc, 'Manufacturer's Liability to Persons Other Than Their Immediate Vendees,' 24 Va.L.Rev. 134, 158, at p. 148. The action on a warranty sounded in tort was in the nature of an action on the case for deceit, although it was not necessary to plead or prove scienter. 1 Williston on Sales, p. 371."

There is an extensive literature concerning the history and nature of the so-called rule of strict liability. Concededly, the doctrine is one of comparatively recent and rapid development. We need not here reiterate its history. Cited in the margin are those authorities and treaties deemed most important and persuasive in bringing the doctrine to its present status.[2]

[2] We are further in agreement with the Torts Restatement rule relating to contributory negligence as a defense to an action based upon strict liability, viz:

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[2] Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633, 48 L.R.A., N.S., 213 (1913), discussed in 19 Sw.L.J. 5, 11; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963); Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) [This opinion contains an elaborate

"Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. * * *" § 402A, Comment (n), Contributory Negligence.

[3] The rules above stated control the disposition of this case. The product involved is a permanent wave preparation known as "Zotos Lanolin Bath". L. A. Mc-

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citation and review of Texas and American authorities, noted in 19 Sw.L.J. 198 (1965)]; B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959); Vandermark v. Ford Motor Co., 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); Picker X-ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Municipal Ct. App. 1962), noted in 5 Ariz. L. Rev. 306 (1964); Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965); Kroger Co. v. Bowman, Ky., 411 S.W.2d 339 (1967); State Stove Mfg. Co. v. Hodges, Miss., 189 So.2d 113 (1966); Shoshone Coca-Cola Bottling Co. v. Dolinski, Nev., 420 P.2d 855 (1966); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963); 2 Frumer & Friedman, Products Liability, § 16 (1966); Prosser, Torts, § 97 (3d Ed. 1964); Freedman, Defect in the Product: the Necessary Basis for Product Liability in Tort and in Warranty, 33 Tenn. L. Rev. 323 (1966); James, General Products — Should Manufacturers Be Liable Without Negligence? 24 Tenn. L. Rev. 923 (1957); James, Products Liability, 34 Tex L. Rev. 192 (1955); Keeton, Products Liability — Some Observations About Allocation of the Risk, 64 Mich. L. Rev. 1329 (1966); Keeton, Products Liability — Liability Without Fault and the Requirement of a Defect, 41 Texas L. Rev. 855 (1963); Keeton Products Liability — Current Developments, 40 Texas L. Rev. 193 (1961); Lascher, Strict Liability in Tort for Defective Products, 38 So. Calif. L. Rev. 30 (1965); Noel Manufacturers of Products — The Drift Toward Strict Liability, 24 Tenn. L. Rev. 963 (1957); Percy, Products Liability — Tort or Contract or What, 40 Tul. L. Rev. 715 (1966); Prosser, The Attack Upon the Citadel, 69 Yale L.J. 1099 (1960); Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966); Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 367 (1965); Wade, Strict Tort Liability of Manufacturers, 19 Sw.L.J. 5 (1965); Comment, 64 Mich. L. Rev. 1350 (1966); Comment, 27 Mo. L. Rev. 194 (1962); Comment, 33 Tenn. L. Rev. 341 (1966); Comment, 52 Va. L. Rev. 509 (1966).

Kisson brought suit against Sales Affiliates, Inc., the distributor[3] of the Zotos preparation, for damages sustained by his wife, Ellen McKisson, as a result of her using the lotion. Mrs. McKisson owned a beauty shop in Amarillo, Texas and on April 13, 1965, one of her employees gave her a permanent wave treatment using the Zotos lotion. Shortly after said permanent treatment was completed, substantial amounts of Mrs. McKisson's hair fell out and burns of the face and scalp became apparent. The cause was tried to a jury which found that:

The Zotos preparation was not reasonably fit for the purpose of giving permanent waves; Ellen McKisson was damaged as a result of using such product for a permanent wave; the use of the product was the proximate cause of the damages sustained by Ellen McKisson; Sales Affiliates, Inc. failed to provide adequate directions for the use of Zotos preparation; such failure was negligence; such negligence was the proximate cause of Mrs. McKisson's injuries; Zotos preparation should not be applied to bleached hair; a reasonably prudent beauty operator in the exercise of ordinary care would have known that the wave lotion should not be applied to bleached hair; the application of the Zotos preparation to Ellen McKisson's hair was negligent; such negligence was a proximate cause of the damages sustained by Mrs. Kisson; and $1,000.00 would fairly and reasonably compensate the plaintiff, L. A. McKisson

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[3] Strict liability in tort lies against a distributor as well as a manufacturer. See, e.g., Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); Tice v. Wilmington Chem. Corp., Iowa, 141 N.W.2d 616, 626 (1966); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Restatement (Second) of Torts, § 402A, Comment (f) (1965); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1141 (1960), Compare, Bowman Biscuit Co. of Tex. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952).

for the injuries sustained by his wife in using the Zotos preparation. The trial court rendered judgment for the plaintiff upon the jury's findings. The Court of Civil Appeals reversed and rendered judgment that plaintiff take nothing. 408 S.W.2d 124.

The Court of Civil Appeals declined to apply the doctrine of Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942), to the present case because foodstuffs were not involved and there was no privity between the parties. Said Court further held that any cause of action based upon negligence in failing to provide adequate instructions for the use of the product was defeated by the findings of contributory negligence.

Quite often, the extension of common law doctrines is left to the court of last resort by intermediate courts and the action of the Court of Civil Appeals in the present case is in accordance with similar actions taken by other appellate courts.[4]

Only three witnesses testified at the trial, Mrs. Ellen McKisson, her husband, the plaintiff, L. A. McKisson, and Theodore P. Pritsker, a chemical engineer, called as a witness by the plaintiff. The defendant called no witnesses.

Mrs. McKisson testified that she was 52 years of age and the owner of a beauty shop and gift shop; that she was not, however, a licensed beauty operator; that on February 3, 1965, her hair had been bleached by using a

[4] For example, See note, Page Keeton, Products Liability — Current Developments, 40 Texas L. Rev. 193, l.c. 207, and reference to Brown v. Howard, 285 S.W.2d 752 (Tex. Civ. App. 1955, wr. ref'd n.r.e.), a case involving injury to cattle (property) rather than injury to the person, in which the Court of Civil Appeals refused to apply the rule of *Decker* to a chemical spray for cattle because among other reasons, the Supreme Court of Texas had not at that time extended the strict liability doctrine beyond food for human consumption.

lightener and peroxide; that in February 1965, a salesman gave her a sample of Zotos Lanolin Bath; that this preparation remained in the same condition from February until she attempted to use it on April 13, 1965; that on the last date mentioned, she requested one of her employees to give her a permanent using the Zotos preparation consisting of a hair conditioner and a neutralizer; that the lotion container carried a label which said, "Zotos Lanolin Bath, lanolized waving lotion, formula No. 1, for normal or resistant hair, follow accompanying directions. Zotos, Division of Sales Affiliates, Inc., Distributor"; that no directions accompanied the sample; that her hair was normal, that is, her hair was good and strong, had not been misused or abused, was of good texture and "in very good condition"; that she considered that her hair was "normal"; that she would not classify her hair as resistant but considered that she had normal hair on April 13, 1965, although it had been bleached in February; that although she was not a licensed operator, she knew that ordinarily a different formula was used for bleached hair than for unbleached hair and that most preparations which were not suitable for bleached hair contained as part of the label a clear statement, "Do not use on bleached hair", or some similar statement.

She further testified that the operator first made a test curl which was apparently satisfactory; that her hair was then rinsed and put up on rollers and then treated with the permanent wave lotion; that after the lotion had been applied, the curl was tested until it reached the "right stage of curl", and then the neutralizer was applied; that when this was done, "about the time we got down to almost to the base of my neck back here, well, the top part all started falling off, hair, rollers, and everything"; that her employee immediately started pouring water on her

hair to wash out the lotion, but although the hair on the side of the head did not fall out, all the hair on the top, the crown of her head, was gone; that by morning, her eyes were swollen shut and it took 30 to 40 minutes with hot applications to get her eyes open; that she suffered severely from the burns and swelling on her face and scalp for about four days and some of the pain persisted for ten days.

Mr. McKisson corroborated his wife's testimony as to her personal injuries, burns, swellings, etc.

Mr. Pritsker, the chemical engineer, testified that he was the director of the Dallas Laboratories at Dallas, Texas; that at the request of the plaintiff he examined the remaining portions of the Zotos preparation used by Mrs. McKisson which consisted of a lanolized waving lotion and a neutralizer; that he found the waving lotion contained 2.4% thioglycolic acid, 67% water and 30.6% emulsifying agents, oily clouding agents, lanolin, etc.; that the pH (a chemical term indicating the acidity or basicity of a solution) was found to be 8.9; that the neutralizer was 2.3% hydrogen peroxide, 67% water and 30.7% oily agents and emulsifiers; that thioglycolic acid, if in sufficient concentration, will act as a depilatory, i. e., a chemical agent or material that removes hair by breaking the fibers of the hair close to the roots, and that there was a reasonable probability that the waving solution had separated into two phases, thus creating in effect two solutions, one of which had a higher strength of thioglycolic acid than the other (the label contained no direction to shake before using); that this higher strength in thioglycolic acid could easily have acted as a depilatory instead of a waving lotion, and that there was "a higher degree of probability that the concentrated portion of the waving lotion would cause a woman's hair to fall out or be lost".

[4-6] In our opinion, the plaintiff made out a case of strict liability in tort. For advertising purposes, the product was delivered to plaintiff's wife in sealed or closed containers with the expectation that it would be used by her either upon her own hair or that of one of the patrons of the beauty shop. One who delivers an advertising sample to another with the expectation of profiting therefrom through future sales is in the same position as one who sells the product. The jury found that the Zotos preparation was not reasonably fit for the use of giving permanent waves and that Mrs. McKisson's attempted use of the product was the proximate cause of her injuries. The evidence above discussed supports this finding. When it is shown that the product involved comes in a sealed container, it is inferable that the product reached the consumer without substantial change in the condition in which it was sold. See, e. g., Kroger Co. v. Bowman, Ky., 411 S.W.2d 339 (1967); Shoshone Bottling Co. v. Dolinski, Nev., 420 P.2d 855 (1966). It appears that nothing was done with the curling preparation which would change its properties or characteristics after it was delivered to Mrs. McKisson.

The jury also found that the defendant failed to provide adequate directions for the use of the preparation. While this issue may form the basis of liability founded upon negligence, it also has a bearing upon whether or not Mrs. McKisson made a proper use of the lotion. If the chemicals in the lotion became separated so that one portion of the contents of the container contained more thioglycolic acid than it should and in effect became a depilatory, as suggested by the testimony of the chemical engineer, the label gave no warning of the possibility or probability of such occurrence, nor did the label state that the preparation should be shaken before using or that it was unfit for bleached hair. The only warning set forth on the label, if

such it may be called, was the statement that the formula was for normal or resistant hair. No other instructions accompanied the product.

The plaintiff's petition set forth two bases for recovery, namely, negligence and strict liability. Although Mrs. McKisson was not a beauty operator, we will assume that because of her ownership of the business and close connection with its operations, she would be charged with a standard of care measured by the conduct of a reasonably prudent beauty operator. Based upon such assumption, we may conclude that the jury's finding upon the contributory negligence issue would bar a recovery based upon negligence. It does not, however, bar a recovery based upon strict liability which is not based upon negligence. Torts Restatement, § 402A, Comment (n). The contributory negligence issue submitted here inquired as to whether or not Mrs. McKisson's conduct was sub-standard when measured by the test of a "reasonably prudent beauty operator."[5]

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[5] Special Issue No. 3 contained four parts or questions designated by letters. By its answer to question (a), the jury found that the lotion in question should not have been applied to bleached hair. Questions (b) and (c) answered by the jury in the affirmative, were as follows:

> "(b) Do you find from a preponderance of the evidence, if any, that a reasonably prudent beauty operator in the exercise of ordinary care would have known that the wave lotion in question should not be applied to bleached hair, if you have so found?"
>
> "(c) Do you find from a preponderance of the evidence, if any, that the application of the lotion in question to the hair of Ellen McKisson on the occasion in question was negligence?"

Negligence was defined as meaning the failure to use ordinary care.

Question (d) was a proximate cause issue to be answered if the negligence issue was answered in the affirmative.

[7] The defendant contends that the Zotos Formula No. 1 carried a label which stated that it was for normal or resistant hair;[6] that Mrs. McKisson's hair was not normal hair in that it had been bleached, and she was negligent in attempting to use the preparation. We may accept the contentions and assumptions advanced by defendant but the burden of the argument remains that Mrs. McKisson was at fault in not discovering that the product was unsuitable for bleached hair. This species of contributory negligence is not a defense to strict liability. We have discussed this matter in some detail in Shamrock Fuel & Oil Sales Co. v. Tunks, District Judge, Tex., 416 S.W.2d 779, this day decided, and need not repeat the arguments and authorities therein set forth.

The judgment of the Court of Civil Appeals is reversed and that of the trial court affirmed.

DISSENTING OPINION

GRIFFIN, Justice.

I dissent from the holding that contributory negligence is not a defense to this action for the reasons I have set out fully in my dissent filed to the majority opinion in Shamrock Fuel & Oil Sales Co. v. Tunks et al., Tex., 416 S.W.2d 779.

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[6] The presence of burns upon the scalp and face of Mrs. McKisson is not explained upon a theory compatible with the premise that Formula No. 1 was safe for use on normal hair. As mentioned, the defendant called no witness.

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IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-47

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL,

Petitioners,

v.

CLARENCE BOREL,

Respondent.

REPLY OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

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REPLY OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

Respondent, Clarence Borel (through his widow, Thelma Freida Borel) opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 10, 1973 and the denial of the motion for rehearing entered on May 13, 1974.

REASONS FOR REFUSING THE WRIT

1. *Borel had not been warned, as a matter of law, by the enactment of the Texas Workmen's Compensation Statute* (Petitioners' First Question).

The defendants' contention is that the Texas Legislature performed and discharged the duties incumbent upon the defendants to warn in a strict liability action concerning any products containing asbestos that may produce asbestosis.

The rule that all persons are conclusively presumed to know the law when applied to the instant case means simply that Mr. Borel was presumed to know that asbestosis is a compensable occupational disease under the Texas Workmen's Compensation Act, and for purposes of workmen's compensation is presumed to know that it is defined as set forth in the Statute. *THIS IS THE EXTENT OF THE PRESUMPTION – NO MORE.* The contention is contrary to the prior contentions of the defendants that they did not warn because of their lack of knowledge. Judicial notice that asbestosis is covered under the Texas Workmen's Compensation Statute has nothing to do with the knowledge of risk from using the products so that a court can hold as a matter of law that Borel knew and appreciated the dangers involved and voluntarily assumed the risk. This was submitted to the jury, and they found against defendants.

The principle that a person is presumed to know the law and the rules and effect of judicial notice are two completely unrelated items, and judicial notice goes only to the question of legal proceedings followed by the courts and applied to trials. The question here is not whether Borel knew the law. The question is one of fact concerning assumption of risk.

To hold that Borel assumed the risk as a matter of law because of the Texas Workmen's Compensation Act, would have the effect of determining as a matter of law that the defendants were not liable under any circumstances and would deny Borel the right of trial by jury on a fact question.

2. The judgment of the Fifth Circuit is not in conflict with another Court of Appeals on substantive or procedural matters.

Petitioners claim:

(a) *The failure to submit an interrogatory to the jury denied the defendants' defense of "assumption of risk" and right to a trial by jury* (Petitioners' Second Question).

(b) *That the opinion fails to follow Rule 49 (a) and is in conflict with other opinions of the Fifth Circuit and an opinion of the Fourth Circuit Court of Appeals* (Petitioners' Third Question).

(c) *The trial court in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved deprived defendants of a trial by jury* (Petitioners' Fou th Question).

"The trial court submitted this case to the jury on general instructions and special interrogatories . . . ." (Appendix to Petition, Page A-60, Opinion on Motion for Rehearing) and not on special interrogatories alone, as stated by the defendants in their petition, at page 16. The trial court instructed the jury, ". . . . if you find from a preponderance of the evidence that the deceased knew of the dangerous nature of the asbestos products with which he was working and appreciated the danger of working with such products or that he had knowledge through his contractor of the dangerous nature of the product and that he assumed the risk by continuing his work, then you would find against the plaintiff and in favor of the defendants." As stated by the Fifth Circuit, "What more could the defendants want?" The instruction was overly favorable to the defendants, and the jury still found against the defendants that Borel did not assume the risk.

Respondent further contends that there is no conflict with the decision of the Fifth Circuit Court of Appeals and the case cited by petitioners of *McGrath v. Wallace Murray Corp., 10th Cir., 496 F. 1d 229,* because both the Fifth Circuit and the Tenth Circuit held that the entire charge must be viewed in passing upon the

sufficiency of the charge, the omission of particular instructions, or the form of instructions. Neither is there a conflict with the holdings in the cases cited by petitioners at page 17 of their petition (*Scott v. Isbrandsten Co., 4th Cir. 1964), 327 F. 2d 113; Palmiero v. Spada Distributing Co., 9th Cir. 1954), 217 F. 2d 561; Duke v. Sun Oil Co., 5th Cir. 1963, 320 F. 2d 853).* In the *Duke* case the trial court did not give instructions or special interrogatories concerning certain issues raised by the evidence. The Fifth Circuit held that the court must submit the phase of the case which had been raised by the pleadings and evidence on controlling issues to the jury under appropriate instructions.

Rule 49 of the Federal Rules of Civil Procedure gives the trial court wide discretion in the wording and form of verdicts, and as held by the Fifth Circuit, the trial court did not abuse its discretion. See Rule 49, Federal Rules of Civil Procedure, and the cases cited in the Fifth Circuit original opinion, Page A-41 of Appendix to Petitioners' Petition.

Under the trial court's instruction, the jury found the products of the defendants were "defective" and "unreasonably dangerous" as to Borel at the time that the products were sold by the defendants.

The finding of defective and unreasonably dangerous products necessarily involved the balancing of the utility of the products and was covered in the instruc-

tions of the trial court to the jury. The defendants are asking the Supreme Court to hold contrary to the summary of Page Keeton, *Torts, in 22 S. W. L. J., Page 4,* wherein he says:

> *". . . . If, in other words, the utility of a product is outweighed by the dangers involved in its use, the maker is subject to liability, however excusable he was for being ignorant or unaware of the dangers, and even if some of the risks were scientifically unknowable at the time of the production and sale of the product. The fact that the maker was not negligent, and was excusably ignorant of the condition or the dangers thereof, is immaterial."*

Petitioners are asking the Court to instruct the jury that "liability could not be imposed if the utility of the product outweighed the danger involved." This would be holding as a matter of law that a manufacturer of any product would not have any duty to warn. This is not the law. *Davis v. Wyeth Laboratories, Inc., 5th Cir. 1968, 399 F. 2d 121; Messick v. General Motors Corporation, 5th Cir. 1972, 460 F. 2d 485; Keeton, Torts, 22 S. W. L. J. 4; Keeton, Products Liability, 48 Tex. L. Rev. 398.*

This Court should not consider a contention that as a matter of law, the defendants are not liable to Borel or could never be liable in any fact situation under strict liability for the marketing of their products.

3. In reply to the Petitioners' Fifth and last Question, the Respondent says that the holding of the Fifth Circuit which follows the substantive law of Texas on strict liability is not in conflict with decisions of the Supreme Court of Texas or in violation of Article I, Section 16 of the Constitution of the State of Texas.

Following the strict liability rule in Texas as announced by *McKisson v. Sales Affiliates, Inc., 1967, 416 S. W. 2d 787,* and subsequent cases by the Texas courts, does not constitute a bill of attainder, ex post facto law, a retroactive law, or any law impairing the obligation of contracts. *Calder v. Bull, Supreme Court 1798, 3 U. S. 386, 1 L. Ed. 648;* adopted by Texas in *Bender v. Crawford, 33 Tex. 745 (1871).*

The doctrine of strict liability is not a statute and is not penal in nature. *Mellinger v. City of Houston, 68 Tex. 37, 3 S. W. 249 (1887),* cited by the defendants, is not in point, because the case merely holds that the Texas Constitution prohibits the retroactive effect of any statutes and not court decisions.

The traditional common law view is that a court decision has unlimited retroactive operation. In overruling a prior decision, the court does not make new law, but asserts what the law really was all the while. In the case of *Linkletter v. Walker, 1965, 381 U. S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731,* the United States Supreme Court said that, ". . . . the Constitution neither

prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the federal constitution has no voice upon the subject.'"

In the case of *Storrie v. Cortes, 1896, 90 Tex. 283, 38 S. W. 154,* in dealing with ex post facto or retroactive laws, the Texas Supreme Court held, ".... a decision of a court is not law within the provision of the Constitution of the United States. . . .".

The retroactive effect of an overruling decision is neither required nor prohibited by constitutional provisions, but a matter of judicial policy to be determined by the court and weighing whether retroactive application will further or retard its operation. *Linkletter v. Walker,* cited above.

The Supreme Court of Texas in the *McKisson* case could have limited prospectively its decision on strict liability. It did not do so, and therefore, the doctrine of strict liability would apply both retroactively and prospectively.

Because of *McKisson* being decided in 1967 and some defendants placing an insignificant caution on their products in 1966, the petitioners are now seeking to eliminate any liability to any asbestos worker brought about by their silence or secreting of knowledge concerning their unreasonably dangerous products. To hold that the doctrine of strict liability in Texas

in this case would operate prospectively only would be holding as a matter of law that an insulation worker had no cause of action regardless of the facts.

Conclusion

Because there does not exist any special and important reasons, the Fifth Circuit opinion is not in conflict with another Court of Appeals or the applicable State law, and has not sanctioned a departure of a lower court from the usual and accepted course of proceedings so as to call for the exercise of the Supreme Court's power of supervision, and because of the reasons hereinabove set forth, this Honorable Supreme Court should deny petitioners' application for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-47

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL,

Petitioners,

v.

CLARENCE BOREL,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 1974, three copies of the Reply of Respondent Opposing Petition For Writ of Certiorari were mailed by Certified Mail, postage prepaid, to the following counsel for Petitioners and Intervenor:

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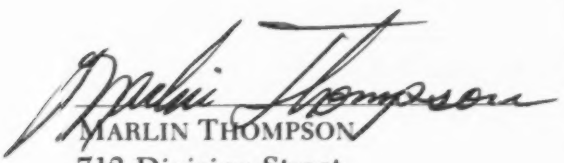

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